Supreme Court, U.S.
FILED
SEP 21 2010
OFFICE OF THE CLERK

No. 10-402

IN THE

Supreme Court of the United States

TUCK-IT-AWAY, INC., et al.,

Petitioners,

v.

NEW YORK STATE URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Petition should be granted to address two urgent questions arising from the Court of Appeals of New York's dismissal of Petitioners' challenge to the legitimacy of the governmental takings at issue in this case:

1. Whether it was error for the Court of Appeals of New York to disregard the principles enunciated in *Kelo v. City of New London*, 545 U.S. 469 (2005) in sanctioning the use of eminent domain for the benefit of a private developer, when the circumstances presented by the instant case exemplify the very bad faith, pretext, and favoritism that this Court warned could result if *Kelo*'s safeguards were ignored?

2. Whether the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States imposes any minimum procedural standards, in accordance with the requirement of fundamental fairness, to preserve a property owner's meaningful opportunity to be heard within the context of an eminent domain taking?

PARTIES TO THE PROCEEDINGS

Petitioners Tuck-It-Away, Inc., *et al.* consist of Tuck-It-Away, Inc., Tuck-It-Away Bridgeport, Tuck-It-Away at 133rd Street, Inc. and Tuck-It-Away Associates, L.P. (collectively, "Tuck-It-Away") and Parminder Kaur, Amanjit Kaur and P.G. Singh Enterprises, LLC (collectively, the "Kaurs").

Respondent is the New York State Urban Development Corporation d/b/a the Empire State Development Corporation ("ESDC").

The petitions of Tuck-It-Away and the Kaurs were never consolidated, but were heard and disposed of together in a single decision and order at both the court of original instance, the New York State Supreme Court, Appellate Division, and at the Court of Appeals of New York.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Tuck-It-Away, Inc., Tuck-It-Away Bridgeport, and Tuck-It-Away at 133rd Street are affiliated by common ownership with:

Tuck-It-Away at 135th Street, Inc.,
Tuck-It-Away Newark, Inc., and
Big Orange and Black, LLC,

but otherwise have no corporate parents or subsidiaries. No publicly-held corporation owns 10 percent or more of each company's stock.

Tuck-It-Away Associates, L.P. is affiliated by common ownership with:

Tuck-It-Away Associates, Ltd.,
Tuck-It-Away Deegan, LLC,
Tuck-It-Away Mott Haven, LLC,
Tuck-It-Away Jerome, LLC,
Tuck-It-Away Dumbo, LLC,
Rising Development Yonkers, LLC,
Rising Development BPS, LLC,
Rising Development 135th Street, LLC,
Rising Media Group, LLC,
Rising Development Company, LLC, and
Rising Management, LLC,

otherwise has no corporate parents or subsidiaries. No publicly-held corporation owns 10 percent or more of its stock.

P.G. Singh Enterprises, LLC does not have any corporate parents, subsidiaries, or affiliates. No publicly-held corporation owns 10 percent or more of its stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6	iii
TABLE OF CONTENTS	iv
TABLE OF APPENDICES	vii
TABLE OF CITED AUTHORITIES	viii
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
PRELIMINARY STATEMENT	2
STATEMENT OF THE CASE	5
Columbia's Campaign To Expand Into Manhattanville	6
New York City's Referral Of The Project To ESDC	7

Table of Contents

	Page
Petitioners' FOIL Litigation	10
Procedural History	12
REASONS FOR GRANTING THE PETITION	17
POINT I	
THIS CASE RAISES THE IMPORTANT FEDERAL CONSTITUTIONAL QUESTION OF WHETHER *KELO* CONTROLS WHENEVER COURTS ARE CONFRONTED WITH EVIDENCE OF IMPERMISSIBLE GOVERNMENTAL FAVORITISM AND PRETEXT IN AN EMINENT DOMAIN TAKING	18
A. Kelo Requires That Safeguards Be Implemented So As To Protect Against Pretext and Favoritism	19
B. Kelo's Safeguards Were Not Observed In The Instant Case And The Planning Process Was Dominated By Pretext And Favoritism	22
1. Columbia's Project was Never Designed To Achieve a Pre-Designated Public Purpose	22

Table of Contents

Page

2. The Identity of the Private Beneficiary Was Known Beforehand 23

3. The Instant Project was Driven by its Beneficiary 23

4. No Competitive Process Was Initiated To Select the Project's Developer 23

5. Because Columbia Paid The Costs of its Own Expansion Campaign, The Project Was Not Pre-Vetted By The Appropriation of Public Funds 24

C. New York's Highest Court Ignored This Court's Warning in Kelo 25

D. Permitting New York's Conscious Disregard of Kelo To Stand Will Only Perpetuate The Confusion In This Area of Law 26

POINT II
THIS CASE PRESENTS AN OPPORTUNITY TO RULE ON WHAT MINIMAL PROCEDURAL SAFEGUARDS ARE REQUIRED UNDER THE DUE PROCESS CLAUSE TO PRESERVE FUNDAMENTAL FAIRNESS IN EMINENT DOMAIN PROCEEDINGS 32

CONCLUSION 38

TABLE OF APPENDICES

Page

APPENDIX A
Kaur, et al. v. New York State Urban Development Corp., & c., 2010 NY Slip Op. 5601, 2010 N.Y. LEXIS 1181 (June 24, 2010) 1a

APPENDIX B
Kaur, et al. v. New York State Urban Development Corp., etc., 72 A.D.3d 1, 892 N.Y.S.2d 8 (1st Dep't 2008) . 35a

APPENDIX C
E-mail of Joseph Petillo to Maria Cassidy, dated May 12, 2006
From the sealed record in *West Harlem Business Group v. Empire State Dev. Corp.*, 13 N.Y.3d 882, 912 (2009), released by order of the Court of Appeals of New York on December 15, 2009. ..... 94a

TABLE OF CITED AUTHORITIES

Page

CASES:

99 Cents Only Stores,
237 F. Supp. 2d 1123 (CD Cal. 2001) 20

Armstrong v. Manzo,
380 U.S. 545 (1965) 33

Brody v. Vill. of Port Chester,
434 F.3d 121 (2d Cir. 2005) 37

County of Hawai'i v. C&J Coupe Family Ltd. P'ship,
198 P.3d 615 (Haw. 2008) 29

Franco v. Nat'l Capital Revitalization Corp.,
930 A.2d 160 (D.C. App. 2008) 28, 30

Kelo v. City of New London,
545 U.S. 469 (2005) ..... *passim*

Mathews v. Eldridge,
424 U.S. 319 (1976) 33

Matter of West Harlem Business Group v. Empire State Dev. Corp.,
13 N.Y.3d 882 (2009) 12, 34

Middletown Twp v. Lands of Stone,
939 A.2d 331 (Penn. 2007) 29

Cited Authorities

Page

Rhode Island Economic Dev. Corp. v. The Parking Company,
892 A.2d 87 (R.I. 2006) 28

Tuck-It-Away v. Empire State Development Corp.,
861 N.Y.S.2d 51 (1st Dep't 2008) 11

Tuck-It-Away v. Empire State Development Corp.,
Index No. 114035/07 (Sup Ct. New York County, Oct 23, 2008) 36

STATUTES:

U.S. Constitution Amendment V 1, 31

U.S. Constitution Amendment XIV § 1 ..... 1, 14

N.Y. UNCONSOL. LAW § 6254(1) 2

N.Y. Eminent Domain Procedure Law § 207 34

N.Y. Eminent Domain Procedure Law § 208 34

OPINIONS BELOW

The opinion of the Court of Appeals of New York is not reported but is available at *In the Matter of Parminder Kaur, et al. v. New York State Urban Dev. Corp., & c.*, and *In the Matter of Tuck-It-Away, et al. v. New York State Urban Dev. Corp., & c.*, 2010 NY Slip Op. 5601, 2010 N.Y. LEXIS 1181 (N.Y. Jun. 24, 2010). The Court of Appeals of New York reversed the December 3, 2009 decision of the New York Supreme Court, Appellate Division, First Department, reported at 892 N.Y.S.2d 8 (1st Dept 2009). *See* Appendices A-B.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a). The Court of Appeals of New York's decision was rendered and entered on June 24, 2010, and is a final order and judgment dismissing Petitioners' actions challenging the legitimacy of Respondent's takings by eminent domain.

CONSTITUTIONAL PROVISIONS INVOLVED

USCA Const Amend. V – Takings.

* * * nor shall private property be taken for public use, without just compensation.

USCA Const Amend. XIV, § 1 – Due Process.

* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *

PRELIMINARY STATEMENT

Five years ago, in a seminal decision upholding the use of eminent domain, this Court reaffirmed that a governmental entity may not "take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." *See Kelo v. City of New London, Connecticut*, 545 U.S. 469, 478 (2005). In so holding, the Court warned that a "one-to-one transfer of property, executed outside the confines of an integrated development plan," would "raise a suspicion that a private purpose was afoot." *Id.* at 487. In his tie-breaking concurrence, Justice Kennedy noted, "[t]here may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption . . . of invalidity is warranted under the Public Use Clause." *Id.* at 493.

The instant case presents just such a situation. Respondent New York State Urban Development Corporation d/b/a Empire State Development Corporation ("ESDC"),[1] the condemning agency, has effectively exercised its power of eminent domain on behalf of and in collusion with Columbia University ("Columbia"), an influential private beneficiary which seeks to expand its campus into New York City's West Harlem neighborhood. The takings at issue – involving private property owned by two local business owners – was orchestrated as part of a longstanding arrangement between ESDC and Columbia, the details of which raise a sharp suspicion that "a private purpose was afoot."

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1. ESDC is an unelected quasi-governmental corporation. *See* N.Y. UNCONSOL. LAW § 6254(1).

In sharp contrast to the situation in *Kelo*, in which a municipal agency adopted a "carefully considered" development plan which had no preselected private beneficiary, ESDC worked backwards, pre-ordaining Columbia as the beneficiary of its eminent domain power. Having settled on this, ESDC endorsed a plan, developed behind closed doors by Columbia itself, to transfer private property to Columbia in furtherance of the university's expansion dreams. ESDC then collaborated with Columbia to devise after-the-fact traditional public purposes to justify the takings, and even allowed Columbia to create the very blight-like conditions that ESDC then proposed to remediate.

The use of eminent domain here was thus a *fait accompli* meant to circumvent any obstacles to the realization of Columbia's private agenda. A two-judge plurality of New York's appellate court recognized that the takings were unconstitutional under *Kelo*, and a third judge joined the plurality to hold that the condemnation was invalid because ESDC had violated Petitioners' due process rights. New York's highest court, the Court of Appeals of New York ("Court of Appeals") nonetheless reversed, upholding ESDC's actions in a 34-page decision that never once mentioned *Kelo*.

The Court of Appeals' conscious disregard of *Kelo* should warrant certiorari in its own right, but, in any event, has ramifications far beyond the particulars of this case. The *Kelo* majority made clear that its decision was predicated on the existence of certain minimum safeguards that demonstrated the absence of favoritism or pretext on the part of a condemning authority. Since *Kelo*, however, courts have struggled to interpret

concepts like "mere pretext," "favoritism," and "a comprehensive development plan," leading to inconsistent results around the country. The Court of Appeals' outright refusal to address *Kelo* brings this confusion to a new level. If such significant evidence of bad faith, pretext, and impermissible favoritism in the context of eminent domain is insufficient to trigger the protections discussed in *Kelo*, then *Kelo* itself, and its safeguards, have been rendered meaningless.

Moreover, Respondent's arbitrary and premature closing of the administrative record prior to the resolution of Petitioners' Freedom of Information Law ("FOIL") litigation violated Petitioners' due process rights under the Fourteenth Amendment to the U.S. Constitution and constitutes a discrete ground for invalidating the proposed taking. Because New York law does not provide for trial-level review of administrative decisions regarding eminent domain, the administrative record comprises the sole record reviewable by an appellate court in any eminent domain challenge. By preventing relevant and responsive documents from ever appearing in the record, Respondent sought to ensure that the "careful and extensive inquiry" that this Court required as a "safeguard" protection in *Kelo* would never come to pass.

Accordingly, this petition should be granted. Unless this Court reverses, or vacates and remands, the decision of the Court of Appeals will become precedent for the proposition that state governments have *carte blanche* to evade the safeguards against pretext and favoritism envisaged in *Kelo* by the mere invocation of traditional public purposes. This Court should take this

opportunity to reaffirm the limitations on governmental overreaching that were contemplated in *Kelo*, and, in so doing, give courts sufficient guidance to effectively review takings by eminent domain.

STATEMENT OF THE CASE

Since the 1990's, New York's Manhattanville, West Harlem neighborhood has attracted the interest of both private businesses and developers. Indeed, in August of 2002, the New York City Economic Development Corporation ("EDC") published a "West Harlem Master Plan," the culmination of an inclusive planning process which incorporated local community feedback and which concluded that Manhattanville's unique economic development potential could be fully realized by simply rezoning the area. Several years later, in June of 2005, the West Harlem Community Board issued its own Master Plan which similarly concluded that rezoning would generate new jobs and business opportunities for the area. Neither EDC's West Harlem Master Plan nor the West Harlem Community Board Plan concluded that Manhattanville was blighted or that eminent domain was necessary or desirable to develop the neighborhood.[2]

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2. Indeed, the West Harlem Community Board voted 29-0 to oppose the use of eminent domain in Columbia's expansion Plan. *See* September 24, 2004 letter of Jordi Reyes-Montblanc, in Tuck-It-Away's Submission for the Record – Volume II (A-1771). All page references with the prefix "A-" refer to the Appendix in the Court of Appeals.

Columbia's Campaign To Expand Into Manhattanville

Columbia, situated in neighboring Morningside Heights, had also set its sights on Manhattanville as the location for its proposed university expansion plan (the "Project"). As part of this endeavor, Columbia began, in 2000, purchasing property in the current Project area.

In late 2001, EDC began meeting privately with Columbia officials regarding Columbia's plan to expand into Manhattanville.[3] In fact, after publishing the West Harlem Master Plan in August of 2002, EDC abruptly ceased all contact with community representatives and businesses, and met exclusively with Columbia and its consultants. By September of 2002, EDC and Columbia were discussing development plans premised on Columbia's total control over the entire Manhattanville industrial zone[4], and EDC gave Columbia "lead responsibility" in developing a proposed rezoning plan.

Columbia defined the proposed Project site – occupying seventeen acres of Manhattanville from approximately 125th Street to 133rd Street and Twelfth Avenue to Broadway – and scope exclusively for its own

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3. *See* October 29, 2001 letter of Michael Carey (RA-1057); West Harlem Pier/Manhattanville Development, Work Plan, June 11, 2002 (RA-427). All page references with the prefix "RA-" refer to Respondent's Appendix in the Court of Appeals.

4. *See* Skidmore, Owings and Merrill, September 20, 2002 Conceptual Integrated EDC/Columbia University Plan (RA-458–461).

needs, and no other alternative development proposals were ever solicited or seriously considered.[5] Columbia also increased its control over the area through property acquisitions, increasing its share of lot ownership from 11 per cent in December of 2002 to 51 per cent by October of 2003.

New York City's Referral Of The Project To ESDC

In September 2003, EDC effectively ceded control of the plan to ESDC for purposes of eminent domain. EDC also commissioned Urbitran Associates ("Urbitran") to perform a blight study. However, Urbitran never produced anything beyond a draft report, containing a mere 12 pages of text, which misapplied the relevant criteria and arrived at unsubstantiated conclusions.[6]

ESDC never seriously considered any developer or plan other than that proposed by Columbia. In fact, on July 30, 2004, ESDC and Columbia signed a "cost agreement," pursuant to which Columbia would reimburse ESDC for all costs related to the Project. Moreover, while an ESDC official questioned Columbia's attorneys about the sufficiency of the Urbitran study,

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5. *See, e.g.*, West Harlem Pier/Manhattanville Development, n. 3, *supra*; Agenda of March 15, 2004 meeting of ESDC, NYC EDC, NYC DCP and NYC Deputy Mayor's Office (RA-484). Four of ESDC's meeting agendas dating from March 2004 to August 2004 reference only Columbia's plan and needs. (RA-1255-1258).

6. The record indicates that Urbitran's blight study was never finalized, and remains a draft to this day. *See* A-3303.

ESDC delayed commencing its own blight study while Columbia continued to purchase buildings within the Project area.

Indeed, by e-mail dated May 12, 2006, ESDC's Senior Counsel, Joseph Petillo ("Petillo"), questioned a draft Request for Proposal ("RFP") for the Manhattanville blight study, stating, "Why do this? ... I'm uncomfortable with us shining a spotlight on the process used to manufacture support for condemnation."[7] Petillo then added: "In this post-Kelo period, maybe we want to craft the support for our blight findings in a less public way – such as more discretely wrapping this up with work being performed by the EIS consultant."

ESDC never did issue an RFP but instead, in September of 2006, commissioned Columbia's own consultant, Allee King Rosen and Fleming, Inc. ("AKRF"), to conduct a blight study. In light of ESDC's efforts to "manufacture support" for blight, the hiring of AKRF hardly appears accidental. AKRF had been advising Columbia on the process of obtaining regulatory applications since the spring of 2004 and drafted, among other things, an Environmental Impact Statement ("EIS") and a City Map Override Proposal[8] that enabled public land to be transferred to Columbia without further public review.

In November of 2007, AKRF issued its Manhattanville Neighborhood Conditions Study, which

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7. *See* Appendix C at 94a.

8. *See* RA-501–516.

concluded that the area in question was blighted. In order to arrive at this conclusion, AKRF departed from the methodologies it had employed in its prior work for ESDC, and even considered types of data that it had previously repudiated.[9] For example, the study did not compare Manhattanville's property values and rental rates with nearby areas over time, even though the original scope of work had specified such an analysis.[10]

By skewing its methodology, AKRF labeled a thriving gas station in otherwise good condition categorically blighted on the sole basis that it was a single-story structure. Ironically, moreover, almost all of the properties deemed blighted were owned or controlled by Columbia, which, at the point that AKRF was retained by ESDC, owned or controlled 64 per cent of the properties in the Project area. Indeed, all of the buildings cited for hazardous accumulation of garbage or debris, evidence of vermin, or mold posing health risks, were Columbia-owned or controlled, and sixteen of the seventeen buildings that were determined to be

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9. For example, AKRF did not explain why it designated as vacant those buildings in Manhattanville with only 25 per cent of floor area unoccupied, when, in a July 2006 study of the Atlantic Yards project in Brooklyn, AKRF had used a 50 per cent vacancy threshold. AKRF's Manhattanville study also emphasized open building code violations as evidence of blight, whereas the Atlantic Yards study had explicitly rejected such evidence as unreliable. *Cf.* AKRF Manhattanville Neighborhood Conditions Study (A-3354); AKRF Atlantic Yards Blight Study, C-5 n.2 (RA-1115).

10. *See* AKRF Proposed Scope of Work, Task 4 (RA-1081).

at least 50 per cent vacant were Columbia-owned or controlled and had been emptied within two years of Columbia's acquisition or assumption of control.[11]

Meanwhile, Columbia's attorneys were hard at work drafting most of the Project documents, including the General Project Plan ("GPP," or the "Plan"). In September of 2006, they redesignated their Project as a "Civic Project," a designation which had hitherto never been invoked on behalf of a private educational institution. Indeed, Columbia had originally promoted the project to EDC and ESDC solely on economic development grounds, and blight remediation was only added later to trigger ESDC's condemnation authority.

Over succeeding drafts of the GPP, Columbia's attorneys added language emphasizing Columbia's contributions to education, the intellectual life of New York City, and the local community in an effort to bolster the "Civic Project" designation. Columbia also "added" a package of funding programs, scholarships, and other amenities, but many of these either represented pre-existing commitments of Columbia's, were unrelated to the facilities to be built, or principally benefited Columbia. Nonetheless, ESDC accepted Columbia's alterations without question.

Petitioners' FOIL Litigation

Petitioner Tuck-It-Away Associates, L.P. and the West Harlem Business Group, of which Tuck-It-Away and the Kaurs were members, sought government

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11. *See* No Blight Study, Table I & Table J (RA-1364–1369, 1372–1374).

records regarding the Plan and its approval process under New York's FOIL Law, but ESDC refused to provide Petitioners with all of the relevant documents. In the face of ESDC's resistance, Petitioners were forced to initiate four separate lawsuits to obtain public documents prior to ESDC's closing of the administrative record.

In July 2008, the Appellate Division affirmed in part two court orders directing ESDC to disclose documents, holding that AKRF's relationship with ESDC and Columbia was "tangled" and that AKRF had served an "advocacy function for Columbia," and had an "inherent conflict in serving two masters."[12] Rather than disclosing all of the documents, ESDC moved for leave to reargue or appeal these decisions, a tactic that enabled it to take advantage of the automatic stay provision in New York's procedural law. On September 9, 2008, a month prior to the deadline ESDC had set to close the administrative record, Tuck-It-Away asked ESDC to keep the administrative record open pending the outcome of the FOIL litigation, but ESDC refused.[13]

On December 15, 2009, the Court of Appeals directed ESDC to release the remaining documents at issue, and, nearly fourteen months after the closing of

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12. *Tuck-It-Away v. ESDC*, 861 N.Y.S.2d 51 (1st Dep't 2008). In February 2008, ESDC, attempted to deflect concerns regarding AKRF's independence by hiring Earthtech, Inc. to "replicate" a blight study using the AKRF's same biased methodology. *See* Appendix B at 61a. Unsurprisingly, Earthtech arrived at the same findings and conclusions as AKRF.

13. *See* September 9, 2008 Letter of Norman Siegel (A-1901).

the administrative record, ESDC did so.[14] Among the documents released to Petitioners in December of 2009 was the Petillo e-mail counseling against transparency in ESDC's commission of the blight study. *See* Appendix C.

On December 18, 2008, ESDC adopted a final GPP that only slightly modified the GPP drafted by Columbia. On December 22, 2008, ESDC published its determination and findings approving the condemnation of Petitioners' property, claiming the Project would create thousands of jobs, hundreds of millions of dollars in tax revenue, and "generate billions of dollars in personal income for New Yorkers."[15]

Procedural History

On January 20, 2009, Petitioners challenged ESDC's use of eminent domain pursuant to Section 207 of New York's Eminent Domain Procedure Law ("EDPL"). The Petitions, which were brought in the court of first instance, the New York State Supreme Court Appellate Division, First Department ("Appellate Division"), alleged violations of both state and federal law, including eight distinct federal claims. Four claims pled violations of the Public Use requirement of the Fifth Amendment to the U.S. Constitution, as incorporated against the states by the Fourteenth Amendment: (1) the takings had been executed in bad faith (A-82, A-140-144); (2) the civic purpose designation for a private university

14. *See Matter of West Harlem Business Group v. Empire State Dev. Corp.*, 13 N.Y.3d 882, 884 (2009), related to the instant case.

15. ESDC Determination and Findings (A-6).

was unconstitutional (A-82, A-145-150); (3) the approval process for the plan was unconstitutional under *Kelo* (A-82, A-150-154); and (4) the scope of the condemnations had been excessive (A-82, A-144-145). Three claims were pled under the Due Process Clause of the Fourteenth Amendment: (1) the use of the term "blight" was void for vagueness (A-82, A-144-145); (2) Respondent's premature closing of the administrative record violated due process (A-83, A-158); and (3) the absence of trial-level review violated due process (A-85, A-159-160). The final federal claim was pled under the Establishment Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment (A-83, A-167).

On December 3, 2009, the Appellate Division granted the petitions. *See* Appendix B. A three-judge majority voted to annul ESDC's determinations and findings regarding the Plan because ESDC had violated Petitioners' federal and state constitutional due process rights and New York's statutory right to be heard by closing the administrative record while withholding documents that two courts had ordered released under FOIL. *Id.* at 72a-74a, 77a-86a. In a concurring opinion, Justice Richter called attention in her due process analysis to the seriousness of Petitioners' allegations of bad faith and pretext, but noted that she need not reach these issues in order to rule for Petitioners. *Id.* at 86a.

The two-judge plurality also held that the proposed taking was "nothing more than economic redevelopment wearing a different face." *Id.* at 48a. Thus, the taking was unconstitutional under *Kelo*, for rather than establish the public purpose before selecting the private

beneficiary, Respondent had disregarded all alternative possibilities, and had handed the entire planning process over to Columbia in "a sovereign sponsored campaign of Columbia's expansion." *Id.* at 55a. Columbia had devised the ostensible public purposes of blight removal and civic purposes only after its demands had been fully met, compelling the conclusion that "the ultimate private beneficiary of the scheme for the private annexation of Manhattanville was the progenitor of its own benefit." *Id.* at 56a. Additionally, the plurality found bad faith, bias, and pretext in ESDC's determination of blight and held that the term "blight" itself was unconstitutionally vague as applied under the Fourteenth Amendment. *Id.* at 68a-72a. ESDC's subsequent attempt to invoke the alternative justification of a "civic project" was also legally insufficient under New York law, the plurality held, and was simply pretext for ESDC's pre-determined plan to choose Columbia as the sole developer of the area. *Id.* at 65a, 47a-48a.

On ESDC's appeal, Petitioners preserved four of their federal claims: the claim that the takings were unconstitutional under *Kelo* and the three Due Process claims.[16] However, on June 24, 2010, the Court of Appeals reversed. *See* Appendix A. In its decision, the Court of Appeals referenced ESDC's assertion that the project would create thousands of jobs, "estimating that 'tax revenue derived from construction expenditures and total personal income during this period' at $122 million for the State and $87 million for New York City."

16. These claims can be found in Petitioners' Court of Appeals Brief at pages 129-139 and 115-129, 118 n.292, and 139-150, respectively.

Id. at 14a, 26a-27a. The court found that, under state law, ESDC's finding of blight and its designation of the Project as a "land use improvement project" were "rationally based and entitled to deference," and that its "alternative finding of 'civic purpose,' likewise, had a rational basis."[17] *Id.* at 2a. Moreover, ESDC's use of the term "substandard or insanitary area" was not unconstitutionally vague on its face,[18] and Petitioners' due process had not been violated "when ESDC both failed to turn over certain documents during the administrative process pursuant to [Petitioners'] FOIL request and closed the record prior to completion of the FOIL litigation."[19] *Id.* at 22a, 27a. Not once in the thirty-

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17. This Court has jurisdiction to consider the federal questions raised by this case. Petitioners challenged the legitimacy of the takings on both state and federal grounds and briefed the unconstitutionality of the takings under *Kelo* in both the Appellate Division and the Court of Appeals. Because *Kelo* controls the "federal baseline" in this context, the state grounds here do not adequately or independently support the judgment, and this Court's resolution of the question of whether the takings pass muster under *Kelo* is material for the outcome of this case.

18. The Court of Appeals failed to address the Appellate Division plurality holding that the UDCA to be unconstitutional *as applied*.

19. While the Court of Appeals did not specify whether its due process finding relied upon state or federal constitutional grounds, this Court has jurisdiction to examine whether there has been a due process violation under the Fourteenth Amendment. Because states must abide by the minimum level of protection guaranteed under the federal constitution, the state constitution does not adequately or independently support the judgment here. *Cf. supra* n. 17.

four page decision was *Kelo* ever mentioned, even though it was discussed during oral argument and relied upon extensively both by the Appellate Division plurality and in Petitioners' Brief.[20]

20. At oral argument, Chief Judge Lippmann discussed the applicability of *Kelo* with ESDC's counsel and asked whether this case was distinguishable because *Kelo* had concerned economic development. *See* June 1, 2010 oral argument in No. 125 *Matter of Kaur v. New York State Urban Development Corporation / Matter of Tuck-It-Away, Inc. v New York State Urban Development Corporation*, 8:35–8:55, available at: http://www.nycourts.gov/ctapps/arguments/2010/Jun10/060110-No125.asx. Chief Judge Lippmann then asked, "Once you denominate [the project] land use, that's when you differentiate it from economic development in the sense of *Kelo*?" *Id.* at 11:00–11:10. ESDC's counsel responded that, because *Kelo* primarily concerned economic development and not blight, it was inapplicable here because of ESDC had found blight. *Id.* at 11:11–11:36. Thus, it appears that, by refusing to address *Kelo* in upholding ESDC's takings, the Court of Appeals decided *sub silentio* that *Kelo* was inapplicable once blight remediation had been asserted as a public purpose.

REASONS FOR GRANTING THE PETITION

This Court should grant the instant petition, not just to rectify the errors committed by the Court of Appeals,[21] but to clarify the circumstances under which the principles of *Kelo* should inform judicial review of eminent domain takings. Five years on, uncertainty continues to plague courts around the country regarding when *Kelo*'s framework for analyzing pretext should apply, the precise meaning of "mere pretext" within the context of eminent domain, and what procedural safeguards are mandated under *Kelo* to ensure that eminent domain does not simply become a tool for use by private developers and entities. Moreover, states have enacted a patchwork of procedural standards regarding a property owner's due process rights in the face of an eminent domain taking, further unsettling this area of law. Accordingly, this petition presents this Court with a prime opportunity, supported by substantial record evidence, to address these issues and cut through the confusion surrounding *Kelo*.

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21. For example, the Court of Appeals truncated Petitioners' claims by characterizing them as sounding predominantly under the public use requirement of article I, §7(a) of the New York State Constitution. *See* Appendix A at 15a. This characterization disregards Petitioners' claims that the instant exercise of eminent domain is also unconstitutional under both the Fifth and Fourteenth Amendments to the U.S. Constitution and under *Kelo*.

POINT I

THIS CASE RAISES THE IMPORTANT FEDERAL CONSTITUTIONAL QUESTION OF WHETHER *KELO* CONTROLS WHENEVER COURTS ARE CONFRONTED WITH EVIDENCE OF IMPERMISSIBLE GOVERNMENTAL FAVORITISM AND PRETEXT IN AN EMINENT DOMAIN TAKING

In upholding a municipality's exercise of eminent domain in *Kelo*, this Court placed particular emphasis on the fact that the development plan at issue "was not adopted to 'benefit a particular class of identifiable individuals,'" 545 U.S. at 478, and noted that the ruling might have been different had there been evidence which "raise[d] a suspicion that a private purpose was afoot," 545 U.S. at 487. Notably, Justice Kennedy conditioned his tie-breaking concurrence on a lengthy list of procedural safeguards built into New London's planning process, but warned that, "there may be categories of cases in which the transfers are so suspicious, or the procedures employed so prone to abuse, or the purported benefits are so trivial or implausible, that courts should presume an impermissible private purpose . . . ." *Kelo*, 545 U.S. at 492.

As discussed *supra* and as the Appellate Division clearly recognized, the instant case presents such a clear example of the sort of bad faith, pretext, and favoritism toward a pre-determined beneficiary that one could only conclude, as the *Kelo* majority darkly warned, that "a private purpose was afoot." *Id.* at 487. As such, this case presents the Court with an opportunity to clarify the

contours of what is, and, importantly, is not, constitutional under *Kelo*. At a minimum, this Petition permits the Court to issue guidance on what constitutes "an impermissible private purpose," and what amounts to "mere pretext" and favoritism in the context of eminent domain. Such guidance would be welcomed by the lower courts which have, in the five years since *Kelo*'s issuance, either struggled to apply its holdings or, in the case of the Court of Appeals, simply ignored it.

A. Kelo Requires That Safeguards Be Implemented So As To Protect Against Pretext and Favoritism

As noted *supra*, in *Kelo*, this Court upheld a taking of private property, by the city of New London, Connecticut, for purposes of economic development. In support of this holding, the *Kelo* majority emphasized that the existence of a "carefully considered development plan," intended to ameliorate a "serious city-wide depression," insulated New London from implications that the taking was for an "illegitimate purpose." *Id.* at 478. "Therefore," this Court concluded, the city's development plan "was not adopted to 'benefit a particular class of identifiable individuals,'" and was thus constitutional. *Id.*

Notably, Justice Kennedy emphasized that, where substantiated allegations of pretext and favoritism exist, courts have an obligation to treat such allegations seriously and conduct a searching review of the facts. *Id.* at 491 ("[a] court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the

presumption that the government's actions were reasonable and intended to serve a public purpose"). In holding such, the Court endorsed *99 Cents Only Stores*, 237 F. Supp. 2d 1123 (CD Cal. 2001), a case invalidating the use of eminent domain where the condemnation was the pretextual outgrowth of prior negotiations between a private beneficiary, Costco, and the condemning authority, because such a condemnation would "achieve the naked transfer of property from one private party to another" to "satisfy the private expansion demands of Costco." 237 F. Supp. 2d at 1129. According to the *Kelo* majority, *99 Cents* constitutes an example of how courts should cast a "skeptical eye" on such suspicious one-to-one transfers of property. *Kelo*, 545 U.S. at 487 n.17.

Justice Kennedy explicitly conditioned his concurrence on specific features undertaken during New London's planning process which convinced him to vote with the majority. Specifically, Justice Kennedy placed great emphasis on the fact that "[t]he identity of most of the private beneficiaries were unknown at the time the city formulated its plans," and that, rather than "picking out a particular transferee beforehand," a variety of different developers and plans were evaluated before one was chosen. *Id.* at 492-493. Given these facts, it was beyond peradventure "that [New London's] development plan was intended to revitalize the local economy, [and not] to serve the interests of Pfizer, Corcoran Jennison, or any other private party." *Id.* at 492. Thus, Justice Kennedy concluded, "while there may be categories of cases in which the transfers are so suspicious, or the procedures employed so prone to abuse, or the purported benefits are so trivial or

implausible, that courts should presume an impermissible private purpose, no such circumstances are present in this case." *Id.*

In so stating, Justice Kennedy clearly articulated his view that, under circumstances involving a pre-determined beneficiary, an absence of competing development plans, or other factors indicating a suspicious transfer or an abuse of process, a taking could well be unconstitutional. Indeed, the majority itself presciently anticipated the instant case when, in support of its decision, it noted that:

> Such a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case. While such an unusual exercise of government power would certainly raise a suspicion that a private purpose was afoot, the hypothetical cases posited by petitioners can be confronted if and when they arise.

Id. at 487. As discussed in more detail *infra*, the very "one-to-one" transfer of property, executed outside the confines of an integrated development plan," which so gravely concerned the *Kelo* Court, is no longer a "hypothetical," but rather, is presented by the instant case. Accordingly, the Court should grant this Petition and "confront[]" what so clearly is an example of bad faith, pretext, and favoritism in the exercise of eminent domain.

B. Kelo's Safeguards Were Not Observed In The Instant Case And The Planning Process Was Dominated By Pretext And Favoritism

The Appellate Division correctly recognized that this case clearly fit within the framework set forth in *Kelo* and that, when analyzed in this manner, ESDC's planning process fell far short of the constitutional requirements demanded by *Kelo*. As that court put it, "[t]he contrast between ESDC's scheme for the redevelopment of Manhattanville and New London's plan for Fort Trumble could not be more dramatic." *See* Appendix B at 54a. Indeed, unlike the situation presented in *Kelo*, the extensive record assembled in this case chronicles, in detail, a history of collusion, bad faith, pretext and impermissible governmental favoritism towards Columbia, a discrete and influential private beneficiary, which "raise[s] a suspicion that a private purpose was afoot." *See Kelo*, 545 U.S. at 487. For example:

1. Columbia's Project was Never Designed To Achieve a Pre-Designated Public Purpose

In contrast to the development plan in *Kelo*, which was specifically designed to ameliorate a "serious city-wide depression," Columbia's plan was never designed or intended to accomplish a pre-designated public purpose. Indeed, "as a matter of record," neither Manhattanville nor West Harlem were economically depressed when EDC and ESDC embarked on their Columbia-prepared-and-financed quest to approve the Project. *See Kaur v. UDC* at 19. The area had never been designated as blighted, nor had any need been

identified for additional private educational facilities in the area.

2. The Identity of the Private Beneficiary Was Known Beforehand

The *Kelo* majority, and Justice Kennedy in particular, placed great importance on the fact that the private beneficiaries of New London's comprehensive plan were unknown at the time of the plan's development. In sharp contrast, from the outset, Columbia was the predetermined beneficiary of the Project, and indeed, proposed the Project and tailored it to meet its demands and specifications.

3. The Instant Project was Driven by its Beneficiary

In *Kelo*, the plan at issue was conceived of and formulated by the city of New London rather than the private beneficiaries. In the instant case, Columbia conceived of, developed, and directed the Project plan. Indeed, even the blight study upon with ESDC relied to justify the taking was prepared by Columbia's consultant, AKRF, whom two separate state courts deemed incapable of being fair or independent. *See* Appendix B at 42a.

4. No Competitive Process Was Initiated To Select the Project's Developer

In his concurrence in *Kelo*, Justice Kennedy noted that New London had considered a number of different developers before settling on one. In the instant case,

neither EDC nor ESDC ever issued any requests for proposals or solicited any alternative developers, but rather, simply ceded the exclusive privilege to rezone Manhattanville to Columbia and then authorized eminent domain on Columbia's behalf.[22]

5. Because Columbia Paid The Costs of its Own Expansion Campaign, The Project Was Not Pre-Vetted By The Appropriation of Public Funds

Unlike the situation in *Kelo*, where the planning process was undertaken and funded by the public fisc, Columbia underwrote all of ESDC's costs in what became, in the words of the Appellate Division, "a sovereign sponsored campaign of [its own] expansion." *Id.* at 55a. Put another way, Columbia was "the progenitor of its own benefit." *Id.* at 57a.

In sum, as the Appellate Division concluded, these factors lead to the undeniable conclusion that the entire Project planning process was riddled by bad faith, pretext, and favoritism. As the plurality of the Appellate Division noted:

> [T]he blight designation in the instant case is mere sophistry. It was utilized by ESDC years

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22. On October 12, 2007, the New York City Planning Commission rejected the local West Harlem Community Board's 197(a) plan, which had been in the making since 1991, on the ground that it did not meet Columbia's needs as defined by Columbia. A 197(a) plan, however, is merely a guide to accommodate development, and does not constitute a concrete proposal by a developer.

> after the scheme was hatched to justify the employment of eminent domain but this project has always primarily concerned a massive capital project for Columbia. Indeed, it is nothing more than economic redevelopment wearing a different face.

Id. at 48a.

C. New York's Highest Court Ignored This Court's Warning in Kelo

Given these facts, the Appellate Division had no difficulty recognizing that, because the entire Project planning process was not only riddled with, but defined by, the very bad faith, favoritism, and procedural abuse that concerned this Court in *Kelo*, the taking was unconstitutional. In reversing this decision, the Court of Appeals ignored both the substantial record evidence of bad faith, pretext, and favoritism, and this Court's directive in *Kelo* to cast a "skeptical eye" on "one-to-one tranfer[s] of property, executed outside the confines of an integrated development plan," which, as the *Kelo* Court noted, "would certainly raise a suspicion that a private purpose was afoot." *Id.* at 487. Specifically, the court ignored the clear evidence that, from the outset, both ESDC and EDC accepted Columbia as the pre-determined beneficiary of the Project and, accordingly, allowed Columbia to plan the entire Project around its own specific needs rather than in furtherance of any pre-designated public purpose.

Moreover, the Court of Appeals similarly ignored the evidence that, in the effort to accomplish this pre-

determined outcome, both the "civic project" and the blight designations (the latter of which was the result of Columbia's own actions) were pretextual. Finally, the court paid no heed to the bad faith and obstructionism employed by ESDC in response to Petitioners' legitimate attempts to ascertain information about the Project.

If *Kelo* is to have any lasting impact on safeguarding fundamental constitutional rights, the basic protections set forth in the decision must be adhered to, both by governmental agencies and by the lower courts. Where, as here, the highest court in the State of New York has failed to do this, this Court should intervene so as to remind courts of their obligation to follow *Kelo*'s precedent.

D. Permitting New York's Conscious Disregard of Kelo To Stand Will Only Perpetuate The Confusion In This Area of Law

Five years after *Kelo*'s issuance, no consensus yet exists among the lower courts regarding whether *Kelo*'s pretext analysis should apply to all eminent domain takings or only to those asserting economic development as a public purpose. In *Kelo*, this Court held that there is ". . . no principled way of distinguishing economic development from the other public purposes that we have recognized," and it would be similarly incongruous to restrict the parameters established in *Kelo* to scrutinizing only those takings premised solely upon economic development. Accordingly, *Kelo*'s analytical framework should apply in all eminent domain cases. 545 U.S. at 484.

However, the lower courts have not uniformly followed this direction. For example, the U.S. Court of the Appeals for the Second Circuit recently suggested that the pretext analysis in *Kelo* is applicable only in those cases involving takings predicated *solely* on economic development. In *Goldstein v. Pataki*, the Second Circuit upheld a taking where the property owners alleged that the asserted public purposes for the taking – the remediation of blight and the creation of affordable housing and recreational facilities at the Atlantic Yards facility in Brooklyn – were pretextual. 516 F.3d 50, 62 (2d Cir. 2008).

Noting that "private economic development [was] neither the sole, nor the primary asserted justification for the Atlantic Yards Project," *id.* at 64, the Second Circuit declined to apply the more searching, "skeptical" review contemplated by this Court in *Kelo*. Rather, the court held that *Kelo* did not mandate "a closer objective scrutiny" if the redevelopment plan at issue was "justified in reference to several classic public uses."[23] *Id.* at 64. Referencing Justice Kennedy's warning that a searching review was required where transfers were so suspicious or procedures so prone to abuse that an impermissible private purpose could be presumed, the Second Circuit suggested that Justice Kennedy "may well have intended this caveat to apply exclusively to

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23. Indeed, the Second Circuit made much of the fact that the *Goldstein* appellants acknowledged the Atlantic Yards project's "rational relationship to numerous well-established public uses," and held that the appellants had not pled that the purported public purposes were either false or irrational, only that "they [were] not the real reason for the Project's approval." *See Goldstein*, 516 F.3d 50, 59.

cases where the *sole* ground asserted for the taking was economic development."[24] *Id.* at 64 n. 10 (emphasis in original).

In contrast, other courts have relied on *Kelo* to either invalidate or remand takings where economic development was not the sole rationale, but was asserted in conjunction with other classic public purposes. In *Franco v. Nat'l Capital Revitalization Corp.*, 930 A.2d 160, 171-72 (D.C. App. 2008), for example, the District of Columbia Court of Appeals remanded, for consideration of pretext, a matter in which the asserted public purpose for the taking included both economic revitalization and crime reduction. In so holding, the *Franco* Court noted that *Kelo* "makes clear there is room for a landowner to claim that the legislature's declaration of a public purpose is pretext designed to mask a taking for private purposes." As well, the Rhode Island Supreme Court invalidated a condemnation where the relevant state agency had cited, as public purposes for the condemnation, both economic development and the creation of airport parking space. *See Rhode Island Economic Dev. Corp. v. The Parking Company*, 892 A.2d 87, 106 (R.I. 2006). In so holding, the court noted that, under *Kelo*, condemning

24. Although Petitioners argue that *Kelo* controls in both situations involving classic public purposes and economic development, Petitioners argued below, and renew their argument here, that the public purposes of blight remediation and civic project, asserted by ESDC, are meritless and pretextual, and that the sole rationale for Columbia's expansion plan is indeed economic development. Given this, even if *Goldstein*'s rationale were correct, *Kelo*'s pretext analysis would still control here.

authorities had the "responsibility of good faith and due diligence" prior to any taking, and concluded that the condemning authority's "hasty maneuvering" bore little resemblance to the comprehensive development plan that was upheld in *Kelo*. Indeed, two other State Supreme Courts have applied *Kelo* where economic development was not asserted at all, but rather, where the sole ground for the taking was a classic public purpose such as the creation of recreational space or the construction of a road. In *Middletown Twp v. Lands of Stone*, 939 A.2d 331, 338 (Penn. 2007), for example, the Pennsylvania Supreme Court invalidated a taking which asserted as its sole public purpose the creation of recreational space. In so doing, the *Middletown* Court cited *Kelo* for the proposition that, "evidence of a well-developed plan of proper scope is significant proof that an authorized purpose truly motivates a taking." *Id.*

As well, the Supreme Court of Hawai'i relied extensively on *Kelo* in remanding a case with express instructions that the trial court consider whether the sole asserted public purpose of constructing a public bypass road – a classic public purpose – had been pretextual. *See County of Hawai'i v. C&J Coupe Family Ltd. P'ship*, 198 P.3d 615, 646-47 (Haw. 2008). Specifically, *County of Hawai'i* involved the construction of a bypass road which had previously been deemed necessary, but which the condemnee alleged "provided 'a predominantly private benefit . . . to [the developer],'" because the private developer had contracted with the condemning authority for the right to designate the road and areas subject to condemnation, and had exercised that right to benefit one of its subdivisions. *Id.* at 644.

In remanding, the Hawai'i Supreme Court unequivocally stated that "[p]lainly it was not the intention . . . of the Supreme Court in *Kelo* to foreclose the possibility of pretext arguments merely because the stated purpose is a 'classic' one." *Id.* at 647. Rather – and in direct contrast to the Second Circuit's holding in *Goldstein* – the *County of Hawai'i* Court remanded to permit "a closer objective scrutiny of the justification being offered." *Id.* at 665.

Also in contrast to *Goldstein*, which limited pretext claims to allegedly false or irrational public purposes, the Supreme Court of Hawai'i concluded that such claims could be considered where the taking had a *predominantly* private benefit, holding that, "the ultimate question for the court is whether the 'actual purpose was to bestow a private benefit.'" *Id.* at 652 (quoting *Kelo*, 545 U.S. at 478). As the court explained, a taking was invalid under *Kelo* whenever "the private character of a taking predominates." *Id.* at 648 n. 36; *accord Franco v. Nat'l Capital Revitalization Corp.*, 930 A.2d 160, 173-74 (2008) ("a reviewing court must focus primarily on benefits the public hopes to realize . . . [i]f the property is being transferred to another private party, and the benefits to the public are only 'incidental' or 'pretextual,' a 'pretext' defense may well succeed"); *Middletown Twp*, 939 A.2d at 337 ("Stated otherwise, the true purpose [of the taking] must primarily benefit the public").

Ultimately, the Hawai'i Supreme Court held that, "[w]hat is fundamental to judicial review is full consideration of the arguments and evidence presented by the defending landowner in its attempt to make the

requisite clear and palpable showing of pretext." 198 P.3d at 652. In defining "full consideration," the court stressed that it was not enough for the trial court to simply consider and then reject appellant's pretext argument, because appellant had "raised circumstances beyond the mere face of the [asserted public purpose]." *Id.* at 649. Rather, citing *Kelo*, the Hawai'i Supreme Court observed that the government's asserted public purpose "need not be taken at face value where there is evidence that the stated purpose might be pretextual." *Id.* at 644 (citing *Kelo*, 469 U.S. at 478). Thus, on remand, the trial court "was obligated to consider any and all evidence that Appellant argued indicating that the private benefit to [the beneficiary] predominated." 198 P.3d at 650.

The Hawai'i decision stands in sharp contrast to the instant case, in which New York's highest court undertook no substantive analysis of Petitioners' pretext claims. Indeed, the word "pretext" appears only twice in the Court of Appeals' majority holding, and any possibility of pretext is summarily dismissed as being "unsubstantiated by the record." *See* Appendix A at 20a. Moreover, as these cases demonstrate, there is considerable confusion among the nation's lower courts on the issue of whether *Kelo*'s searching review even applies where the sole proffered rationale for a taking involves a classic public purpose, rather than economic development.

For these reasons, it is vital that this Court grant this Petition and clarify the meaning of "mere pretext" in the context of an aberrant private-to-private transfer of property. If both *Kelo* and the Fifth Amendment's

Public Use requirement (as applied to the States by the Fourteenth Amendment) are to retain any meaning at all, this Court must define the standard that lower courts must apply when casting a "skeptical eye" in their review of cases involving aberrant private-to-private transfers of property by use of eminent domain.

POINT II

THIS CASE PRESENTS AN OPPORTUNITY TO RULE ON WHAT MINIMAL PROCEDURAL SAFEGUARDS ARE REQUIRED UNDER THE DUE PROCESS CLAUSE TO PRESERVE FUNDAMENTAL FAIRNESS IN EMINENT DOMAIN PROCEEDINGS

Respondent's arbitrary and premature closing of the administrative record violated Petitioners' due process rights under the Fourteenth Amendment to the U.S. Constitution, and constitutes a discrete ground for invalidating the proposed takings.

The Due Process Clause of the Fourteenth Amendment, like the Takings Clause of the Fifth Amendment, imposes fundamental limitations on government's ability to take property. This Court, however, has never clarified what minimum standards must be observed under the Due Process Clause in the context of an eminent domain taking. In the absence of such guidance, the various States have enacted a patchwork of procedural standards; under New York's Eminent Domain Procedure Law ("EDPL"), a petitioner's procedural rights are uniquely circumscribed.

Against this backdrop of procedural constraints, Respondent in this case was able to employ calculated tactics to prevent Petitioners from developing a full and fair record, thereby denying Petitioners their right to a meaningful hearing. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner'" (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965))).

The record here demonstrates Respondent's deliberate efforts to undermine Petitioners' fundamental constitutional rights. For three years prior to ESDC's closure of the administrative record, Petitioners fought to obtain records under the Freedom of Information Law in the face of staunch resistance by ESDC, ultimately forcing Petitioners to bring multiple legal actions to force ESDC to turn over relevant documents. When two separate state courts ordered ESDC to disclose such documents, ESDC again obstructed Petitioners' efforts to obtain vital information, including the Petillo e-mail, by moving for re-argument or leave to appeal and, in the process, availing itself of the automatic stay afforded to governmental authorities pending disposition of such motions. Then, while the motion was pending, ESDC arbitrarily closed the record despite Petitioners request to keep it open during the pendency of the appeal. *See* Appendix B at 77a, 82a-85a.

Ultimately, the Court of Appeals directed ESDC to release the documents in question and held that "this litigation could have been avoided, or significantly limited, had ESDC in the first instance complied with

the dictates of FOIL . . . [and petitioners were] compelled to bring suit to obtain either the documents or explanation of ESDC's denial, the very information it should have received during the administrative appeals process." *West Harlem Business Group v. Empire State Development Corporation*, 13 N.Y.3d 882, 885 (2009). By the time ESDC finally did release these documents, the administrative record had been closed for nearly fourteen months.

ESDC's non-compliance with FOIL and its subsequent gamesmanship might have been immaterial in another state, but in New York, it proved fatal to Petitioners' due process rights. This is because New York's EDPL does not provide for trial level review of administrative decisions authorizing the taking of private property, thus precluding Petitioners from obtaining discovery or examining witnesses. *See* N.Y. E.D.P.L. §§ 207, 208; *Cf. Kelo*, 545 U.S. at 491-92 (noting the "careful and extensive inquiry" conducted by the trial court, which held a seven-day trial that included witness testimony and "documentary evidence" of communications between government and corporate officials). As the Appellate Division noted:

> The petitioners clearly had no ability under the EDPL to call witnesses to supplement the record, introduce further evidence, cross-examine the respondents' witnesses who submitted expert affidavits after the record was closed or submit argument in opposition to those untimely affidavits.

Appendix B at 73a.

Because administrative proceedings constitute the only record available for judicial review in New York, public hearings before administrative agencies become the sole opportunity for those objecting to the legitimacy of a taking to introduce evidence and develop their case. In this way, ESDC's refusal to comply with its FOIL obligations and provide Petitioners with responsive documents, and its closing of the record prior to the full provision of said documents, not only severely impaired Petitioners' meaningful opportunity to be heard, but also raises serious questions regarding the true justification for the Project.

The circumstances surrounding ESDC's production of the May 12, 2006 e-mail from ESDC Senior Counsel Joseph Petillo serves as a case in point. Petitioners were provided with this e-mail – in which Petillo notes his discomfort with highlighting the process by which ESDC "manufacture[d] support for condemnation" – nearly fourteen months after the closing of the administrative record. *See* Appendix C at 94a. Notably, subsequent to Petillo's e-mail, ESDC, which had been poised to release a Request for Proposal to initiate a public and competitive process for obtaining an independent consultant, instead entrusted its blight study to Columbia's consultant, AKRF.

Petillo's e-mail offers an inside perspective on the behind-the-scenes process employed by Columbia and ESDC in pushing through the Project and, as such, is particularly probative on the issue of ESDC's pretext and improper motive. Given this, it is unsurprising that ESDC repeatedly failed to produce this document until long after the administrative record closed, thus ensuring that this e-mail would be sheltered from judicial review.

The Petillo e-mail is just one of thousands of pages of documents that were released by ESDC and other cooperating agencies either immediately prior to, or after, the closing of the administrative record. Indeed, to this day, ESDC continues to withhold documents that remain the subject of FOIL litigation.[25] In light of this, the Court of Appeals' reference to the approximately 8,000 pages of documents that Petitioners received from ESDC is highly misplaced. In actuality, many of these pages were duplicates, and many of the documents were redacted without any basis. Given this, it is difficult to overstate both the materiality of Petillo's email itself and the harm to Petitioners' case as a result of ESDC's willful obstruction of the FOIL and administrative processes. *See* Appendix B at 84a (Richter, J., concurring) ("In light of the withholding of critical documents which were ordered disclosed by this Court, the opportunity provided to Tuck-It-Away here was not meaningful within the spirit of due process").

The facts here compel the conclusion that, but for ESDC's bad-faith conduct, Petitioners would have been able to develop a full record for judicial review in

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25. Pursuant to court orders, ESDC released 64 records, constituting 2,074 pages, either after the closing of the record, or so close to that date, that Petitioners were left with no time to examine them. As of this writing, ESDC continues to withhold 669 records, and the fate of another 500 records remains pending before a New York court. *See Tuck It Away v. ESDC*, Index No. 114035/07 (Sup. Ct. N.Y. County, Oct. 23, 2008). In addition, the New York City Department of City Planning, after moving for reargument and filing an appeal from this court order, never perfected the appeal but instead released at least 796 records (consisting of over 6,000 pages) after ESDC had closed the record.

accordance with basic standards of due process. In this way, the instant case highlights both the importance, to petitioners, of securing a meaningful opportunity to be heard within the context of eminent domain proceedings, and the consequences of the denial of such an opportunity. As a Second Circuit panel, which included then-Circuit Judge Sonia Sotomayor, unanimously held, the EDPL's weighty restrictions upon a petitioner's procedural rights place a greater burden on respondent to preserve a quantum of due process. *See Brody v. Vill. of Port Chester*, 434 F.3d 121, 132 (2d Cir. 2005) (holding that under the flexible standard of due process, more explicit notice was required because of the constitutional significance of the public use requirement and the unique limitations imposed by the EDPL). Weighed against the constitutional dimension of the public use inquiry and Petitioners' limited ability to obtain documents in this case, ESDC's arbitrary and intentional closing of the record cannot be justified, given the relatively insignificant "burden" of keeping the record open until ESDC had turned over to Petitioners all documents ordered to be produced.

Thus, the due process violation suffered by Petitioners ultimately highlights both the fragility of the procedural protections related to eminent domain in New York and their vulnerability to abuse. While New York is unique among the states in precluding trial level review of the legitimacy of a taking, other states have developed a patchwork of statutory protections governing almost every aspect of procedural due process within the context of the power of eminent domain. As a result, due process protections in the eminent domain context vary widely based solely on the situs of the taking.

This case exemplifies the urgent need for minimal, consistent procedural standards to preserve the constitutional requirement of due process and the value of fundamental fairness, particularly where property owners are constrained in their ability to demonstrate pretext or impermissible favoritism. Accordingly, this Court should grant the instant Petition and address not only the due process violation here but also the issue of what due process means in the eminent domain arena.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that the Supreme Court grant review of this matter.

Dated: New York, New York
September 21, 2010

Respectfully submitted,

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APPENDIX

APPENDIX A — DECISION OF THE COURT OF APPEALS OF NEW YORK DATED JUNE 24, 2010

In the Matter of Parminder *Kaur*, et al.,

Respondents,

v

New York State Urban Development Corporation, & c.,

Appellant.

In the Matter of Tuck-It-Away, Inc., et al.,

Respondents,

v

New York State Urban Development Corporation, & c.,

Appellant.

No. 125

JUDGES: Opinion by Judge Ciparick. Chief Judge Lippman and Judges Graffeo, Read, Pigott and Jones concur. Judge Smith concurs in result in an opinion.

OPINION BY: CIPARICK

Appendix A

OPINION

:CIPARICK, J.:

In this appeal, we are called upon to determine whether respondent's exercise of its power of eminent domain to acquire petitioners' property for the development of a new Columbia University campus was supported by a sufficient public use, benefit or purpose (*see* New York Const art I, § 7 [a]; Eminent Domain Procedure Law 207 [C] [4]). We answer this question in the affirmative and conclude, pursuant to our recent holding in *Matter of Goldstein v New York State Urban Dev. Corp.* (13 NY3d 511, 921 N.E.2d 164, 893 N.Y.S.2d 472 [2009]), that the Empire State Development Corporation's ("ESDC") findings of blight and determination that the condemnation of petitioners' property qualified as a "land use improvement project" were rationally based and entitled to deference. We also conclude that the alternative finding of "civic purpose," likewise, had a rational basis.

I.

Petitioners in this proceeding are the owners of different commercial establishments located in the West Harlem neighborhood of Manhattan. Petitioners Parminder Kaur and Amanjit Kaur own a gasoline service station located on West 125th Street. Petitioners Tuck-It-Away, Inc., Tuck-It-Away Bridgeport, Inc., Tuck-It-Away at 133rd Street, Inc., and Tuck-It-Away Associates, L.P. (collectively "TIA") own storage facilities

located on Broadway and on West 131st and West 125th Streets. Petitioner P.G. Singh Enterprises, LLP also owns a gasoline service station located on West 125th Street.

On December 8, 2008, respondent ESDC issued a determination pursuant to EDPL 204, concluding that it should use its power of condemnation to purchase 17 acres of privately owned property, including petitioners', in connection with the Columbia University Educational Mixed Use Development Land Use Improvement and Civic Project (the "Project"). Located in the Manhattanville section of West Harlem, the Project site will extend from the south side of West 125th Street to the north side of West 133rd Street and will be bounded by Broadway and Old Broadway on the east and 12th Avenue on the west. The majority of the buildings located within the proposed Project site are commercial and it is undisputed that petitioners' property is among the property that ESDC is seeking to acquire.[1]

The Project contemplates the construction of a new urban campus that would consist of 16 new state-of-the-art buildings, the adaptive reuse of an existing building and a multi-level below-grade support space. Approximating 6.8 million gross square feet in size, the Project provides for the creation of about two acres of publicly accessible open space, a retail market along 12th

1. There are seven residential buildings located within the Project site. According to ESDC, it "will not exercise its eminent domain power to acquire these seven buildings at any time while they remain occupied by residential occupants."

Avenue and widened, tree-lined sidewalks. The new buildings will house, among other things, teaching facilities, academic research centers, graduate student and faculty housing as well as an area devoted to services for the local community. Columbia University, a not-for-profit educational corporation, will exclusively underwrite the cost of this Project and not seek financial assistance from the government.[2]

The origins of the Project trace back to 2001 when Columbia first approached the New York City Economic Development Corporation ("EDC") to redevelop the West Harlem area. Following Columbia's interest in revitalizing the neighborhood and expanding its campus, EDC commenced a general economic study of the neighborhood. It issued its report, the West Harlem Master Plan (the "Plan"), in August 2002, which outlined a series of strategies for the economic development of the region that would encompass three stages[3]. To effectuate these stated goals, the Plan envisioned changes in zoning that would foster job growth, shopping opportunities and the general enlivening of street life. Significantly, the Plan recognized that "[n]eighboring institutions such as Columbia's

2. In 2007, Columbia estimated the cost of the Project at $ 6.28 billion.

3. The Plan's proposal provided for the development of West Harlem's waterfront (stage 1), improvements to both the streetscape and the public transportation system including increased access to the neighborhood (stage 2) and neighborhood economic development with the articulated goal of creating new jobs (stage 3).

Appendix A

Morningside Heights campus, the main campus of City College, and the Columbia Presbyterian Medical Center can be key catalysts in the economic development of West Harlem. Not only can these institutions provide the day-to-day presence that will enliven the area as a regional attraction, they can also act as partners in job creation."

In 2003, EDC hired Urbitran Associates ("Urbitran"), an engineering, architecture and planning firm, to conduct a separate study, examining the neighborhood conditions of West Harlem. Urbitran documented and photographed the area of the Project site as well as the surrounding area and focused its analysis on four major criteria: (1) signs of deterioration, (2) substandard or unsanitary conditions, (3) adequacy of infrastructure and (4) indications of the impairment of sound growth in the surrounding community. The study, issued by EDC in August 2004, determined that the conditions in the study area merited a designation of blight. Specifically, the study revealed that several of the buildings throughout West Harlem were dilapidated[4]. Urbitran also concluded that numerous buildings evidenced poor exterior conditions and structural degradation. According to this study, two of the blocks with the highest number of deficient buildings and lots are within the Project site.

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4. Dilapidated was defined by Urbitran as "significant evidence of aesthetic degradation (usually a combination of broken windows, peeling paint, and facade damage, among other things)."

Appendix A

Meanwhile, as Urbitran performed its neighborhood conditions study of West Harlem, Columbia began to purchase property located within the Project site[5]. ESDC met with Columbia and EDC for the first time in March 2004 to discuss the proposed condemnation of petitioners' land. As the talks between ESDC, EDC and Columbia ensued, Columbia hired the environmental planning and consulting firm Allee King Rosen & Fleming ("AKRF") to assist Columbia in seeking the necessary agency approval for the Project as well as to prepare the required environmental impact statement ("EIS"). On July 30, 2004, ESDC and Columbia entered into an agreement, which provided that Columbia would pay ESDC's costs associated with the Project.

In September 2006, notwithstanding the results of the Urbitran study, ESDC retained AKRF to perform a neighborhood conditions report of the Project site on its behalf. ESDC chose AKRF, in part, because it was already familiar with the Project site. Moreover, ESDC had worked with AKRF before on other studies in connection with other condemnation proceedings[6]. In turn, AKRF hired Thornton Tomasetti, an engineering firm, to inspect and evaluate the physical conditions of the structures within the Project site.

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5. By October 2003, Columbia owned 51% of the properties in the Project area.

6. Most recently, in determining that the area in downtown Brooklyn, known as the Atlantic Yards, was blighted, ESDC relied upon an AKRF neighborhood conditions study (*see Matter of Goldstein*, 13 NY3d at 518).

Appendix A

AKRF photographed and conducted detailed inspections of each of the individual lots in the Project site. It documented structural conditions, vacancy rates, site utilization, property ownership, and crime data. For each building on the Project site, it also documented the physical and structural conditions, health and safety concerns, building code violations, underutilization, and environmental hazards. AKRF said it selected these factors "because they are generally accepted indicators of disinvestment in a neighborhood. The widespread presence of one or more of these factors can also demonstrate the need for revitalization and redevelopment of an area." Based on these factors, on November 1, 2007, AKRF issued its Manhattanville Neighborhood Conditions Study. This study concluded that the Project site was "substantially unsafe, unsanitary, substandard, and deteriorated" or, in short, blighted.

As ESDC prepared to issue its "blight study" of the Project site, Columbia moved towards obtaining the necessary agency approval to realize its expansion plan. Indeed, the public process for this Project was extensive and formally began when the New York City Planning Commission ("CPC") first considered whether to authorize the rezoning of about 35 acres of West Harlem, including the 17 acre Project site. The rezoning of this area, recommended in EDC's West Harlem Master Plan, triggered a thorough review according to New York City's Urban Land Use Review Procedure ("ULURP").

Consequently, on November 16, 2007, CPC, pursuant to the New York State Environmental Quality Review

Act ("SEQRA") and the City Environmental Quality Review Act ("CEQRA") issued a notice of completion for the Project's final EIS ("FEIS"). The FEIS evaluated nine different plans for the Project site. Since none of the other plans provided for publicly accessible open spaces and community facilities, CPC determined that the proposed alternatives were less beneficial to the public than the rezoning based on Columbia's proposal.

Ten days after it issued the notice of completion, CPC released its findings on the FEIS. In its findings, CPC noted that Columbia "is of significant importance to the City and State as a center of educational excellence and a source of economic growth, and the Academic Mixed Use Development Plan is intended to fulfill these public purposes." Thus, CPC approved the rezoning that would allow Columbia to construct "a new urban campus" that will be "integrated with the urban grid, with all streets remaining open to the public . . . and a new open space network open to University-affiliated personnel and the general public alike." CPC further recognized that the proposed Project may require the use of eminent domain, which, if necessary, "would serve a public purpose insofar as it would allow for realization of the public benefits of the Columbia proposal." Following CPC's approval of the rezoning in West Harlem, the City Council held a public hearing on this matter and on December 19, 2007, it approved the 35 acre rezoning of West Harlem.

Meanwhile, certain business groups located within the Project site, including petitioner TIA, requested

documents related to the Project on several occasions pursuant to the Freedom of Information Law ("FOIL"). In response, ESDC turned over about 8,000 pages of documents to petitioners. Petitioner TIA and the other business groups, however, believing that they were entitled to other documents not disclosed by ESDC, filed separate CPLR article 78 petitions.

Supreme Court, after an extensive in camera review of the documents in dispute, granted the applications of petitioner TIA and the other business groups and ordered, in relevant part, the release of certain documents in ESDC's possession, including documents related to its July 2004 agreement with Columbia as well as its correspondence with AKRF. ESDC appealed the order of Supreme Court to the Appellate Division. On July 15, 2008, the Appellate Division affirmed the portion of Supreme Court's order requiring the disclosure of documents related to ESDC's agreement with Columbia as well as its communication with AKRF (*see Matter of Tuck-It-Away Assoc., L.P. v Empire State Dev. Corp.*, 54 AD3d 154, 162, 861 N.Y.S.2d 51 [1st Dept 2008]). In its ruling, the court called into question AKRF's "tangled relationships" with both ESDC and Columbia (*Matter of Tuck-It-Away Assoc., L.P.*, 54 AD3d at 166). Following the order of the Appellate Division, ESDC disclosed its correspondence with AKRF, but otherwise appealed the order of the Appellate Division to this Court.

It is important to note that the appeal brought before us late last year concerned the disclosure of just

five documents (*see Matter of West Harlem Business Group v Empire State Dev. Corp.*, 13 NY3d 882, 884, 921 N.E.2d 592, 893 N.Y.S.2d 825 [2009]). ESDC argued to us and the courts below that the July 2004 paperwork related to its agreement with Columbia was exempt from disclosure under Public Officers Law § 87 (2) (c) because disclosure "would impair present or imminent contract awards or collective bargaining negotiations." We concluded, however, that ESDC failed to meet its burden under FOIL of establishing that those documents were exempt from disclosure because it did not articulate a particularized reason for denying disclosure. Accordingly, we affirmed the order of the Appellate Division.

Because the courts below raised concerns about the propriety of ESDC's choice to hire AKRF to conduct a neighborhood conditions study of West Harlem, ESDC retained a second engineering and environmental consultant, Earth Tech, to separately assess the conditions of the Project site and issue an independent report. Earth Tech, which had no prior affiliation with Columbia, was specifically instructed not to provide any services to Columbia while it worked for ESDC.

Charged with the task of performing yet another "blight study" of the area, Earth Tech engineers independently photographed, inspected and assessed each of the lots on the Project site. In May 2008, Earth Tech issued its Manhattanville Neighborhood Conditions Study. In the study, Earth Tech noted certain variables including current land uses, structural conditions, health and safety issues, utilization rates,

environmental contamination, building code violations and crime statistics. Earth Tech determined that since 1961, there was a dearth of new construction in the area, finding a "long-standing lack of investor interest in the neighborhood." Earth Tech also enumerated the extensive building code violations in the area and the chronic problems that the buildings had with water infiltration.

Earth Tech also found that many of the buildings in the Project site had deteriorated facades and that several of the buildings had been sealed by the New York City Fire Department because of unsafe conditions. It also discovered widespread vermin on the streets and graffiti on the walls of the buildings and other structures. With respect to the four parcels owned by petitioner TIA, Earth Tech determined that these parcels, taken together, had more than three times the average number of building violations as the parcels acquired by Columbia over the previous several years[7]. In sum, Earth Tech concluded that the neighborhood conditions created "a blighted and discouraging impact on the surrounding community."

With the "blight studies" of both AKRF and Earth Tech in hand and with the knowledge that the City Council had approved the Project site for rezoning, on

7. In one example, Earth Tech found that petitioner TIA unlawfully used its building located at 3300 Broadway as a parking garage in violation of zoning laws and its certificate of occupancy. As a result, in 2008, the building had to be evacuated in order to avoid imminent collapse.

July 17, 2008, ESDC adopted a General Project Plan ("GPP") that would enable Columbia to move forward with its plan to build an urban campus in West Harlem. Pursuant to EDPL 201 and 202, ESDC solicited public comment on the GPP, holding a duly noticed hearing on September 2 and 4, 2008. This hearing, which lasted over 13 hours, was attended by 98 members of the community, including petitioners and their counsel. The purpose of the hearing was to provide those interested with the opportunity to comment on the GPP and the public purpose of the Project. At the hearing, ESDC distributed copies of its adopted GPP as well as copies of the FEIS, and the AKRF and Earth Tech neighborhood conditions reports. These documents, made available to the public by ESDC in July 2008, along with the record of the two-day hearing, remained open for public inspection until October 30, 2008, the close of the comment period.

Petitioners, with access to all 8,000 or so documents that comprised the administrative record in this case (and turned over pursuant to FOIL requests), responded to the GPP adopted by ESDC. Indeed, petitioners submitted two legal memoranda and thousands of pages of materials in opposition to the Project during the comment period. ESDC, in turn, prepared a comprehensive 75-page document entitled "Response to Comments," which thoroughly addressed the concerns raised by petitioners and others.

Taking into consideration the questions raised by the petitioners during the hearing and their substantial

written submissions that followed, on December 18, 2008, ESDC adopted a modified GPP and authorized the issuance of its findings and determination. ESDC sponsored the Project both as a "land use improvement project" pursuant to the New York State Urban Development Corporation Act ("UDC Act") (McKinney's Uncons Laws of NY § 6253 [6] [c]) and as a "civic project" pursuant to a different subdivision of the same Act (Uncons Laws § 6253 [6] [d]).

In so sponsoring this Project, ESDC specified the public uses, benefits and purposes of the Project pursuant to its obligations under EDPL 204 (B) (1). It found, for example, that the Project would address the city and statewide "need for educational, community, recreational, cultural and other civic facilities" and would enable New York City and the State to maintain their positions as "global center[s] for higher education and academic research." ESDC further determined that Manhattanville "suffer[ed] from long-term poor maintenance, lack of development and disinvestment" and the Project would help curb the "current bleak conditions [that] are and have been inhibiting growth and preventing the site's integration into the surrounding community."

In eliminating the blighted conditions plaguing the area of the Project site, ESDC noted that the Project would create 14,000 jobs during the construction of the new campus as well as 6,000 permanent jobs following the Project's completion. ESDC found that the Project would generate substantial revenue, estimating that

"tax revenue derived from construction expenditures and total personal income during this period" at $ 122 million for the State and $ 87 million for New York City.

Moreover, ESDC indicated that another purpose of the Project was the creation of much needed public space. Specifically, it found that the Project sitewould create "approximately 94,000 square feet of accessible open space and maintained as such in perpetuity that will be punctuated by trees, open vistas, paths, landscaping and street furniture and an additional well-lit 28,000 square feet of space of widened sidewalks that will invite east-west pedestrian traffic."

In addition to the open space created, ESDC highlighted that the Project made provision for infrastructure improvements — most notably to the 125th Street subway station — as well as substantial financial commitment by Columbia to the maintenance of West Harlem Piers Park. ESDC further acknowledged that Columbia would open its facilities — including its libraries and computer centers — to students attending a new public school that Columbia is supplying the land to rent-free for 49 years. Columbia would also open its new swimming facilities to the public.

Nonetheless, on February 20, 2009, petitioners challenged ESDC's findings and determination in the Appellate Division pursuant to EDPL 207. A plurality of that court concluded that "ESDC's determination that the project has a public use, benefit or purpose is wholly unsupported by record and precedent" (72 AD3d 1, 9,

892 N.Y.S.2d 8 [1st Dept 2009]). One Justice, concurring in the result, opined that petitioners' "procedural due process and statutory rights were violated by ESDC's refusal to keep the record open until the conclusion of the FOIL litigation initiated by [petitioner] Tuck-It-Away" (*id.* at 28)

Two Justices of the court dissented. They concluded that "ESDC's finding that the project will serve a public purpose by providing, among other things, needed educational facilities in the area in which it is to be located is neither irrational nor baseless" and was entitled to deference (*id.* at 33). The dissenting Justices also rejected the argument that petitioners were denied procedural due process (*id.* at 35).

Respondent appealed as of right, pursuant to CPLR 5601 (a) and (b), and we now reverse.

II.

Petitioners' main argument on this appeal is that the Project approved by ESDC is unconstitutional because the condemnation is not for the purpose of putting properties to "public use" within the meaning of article I, § 7 (a) of the NY Constitution, which, provides that "[p]rivate property shall not be taken for public use without just compensation." First, petitioners vociferously contend that ESDC's blight findings were made in bad faith and the Project only serves the private interests of Columbia. ESDC counters that the duly approved Project qualifies as a "land use improvement

project" within the meaning of the UDC Act and that the Appellate Division plurality erred as a matter of law when it conducted a de novo review of the administrative record and concluded that the Project site was not blighted. We agree with ESDC.

"[I]t is indisputable that the removal of urban blight is a proper, and, indeed, constitutionally sanctioned, predicate for the exercise of the power of eminent domain. It has been deemed a 'public use' within the meaning of the State's taking clause at least since *Matter of New York City Housing Authority v Muller* (270 NY 333, 1 N.E.2d 153 [1936]) and is expressly recognized by the Constitution as a ground for condemnation" (*Matter of Goldstein*, 13 NY3d at 524).[8]

In *Matter of Goldstein*, we reaffirmed the longstanding doctrine that the role of the Judiciary is limited in reviewing findings of blight in eminent domain proceedings (*see id.* at 526). Because the determinations of blight and public purpose are the province of the Legislature, and are entitled to deference by the Judiciary, we stated that:

> "Whether a matter should be the subject of a public undertaking — whether its pursuit will serve a public purpose or use — is

8. Article XVIII, § 1 of the NY Constitution authorizes the Legislature to "provide in such manner, by such means and upon such terms and conditions at it may prescribe . . . for the clearance, replanning, reconstruction and rehabilitation of substandard and insanitary areas."

> ordinarily the province of the Legislature, not the Judiciary, and the actual specification of the uses identified by the Legislature as public has been largely left to quasi-legislative administrative agencies. It is only where there is *no room for reasonable difference of opinion* as to whether an area is blighted, that judges may substitute their views as to the adequacy with which the public purpose of blight removal has been made out for that of the legislatively designated agencies"

(*id.* [emphasis added]). Indeed, we observed that "[t]he Constitution accords government broad power to take and clear substandard and insanitary areas for redevelopment. In so doing, it commensurately deprives the Judiciary of grounds to interfere with the exercise" (*id.* at 527). These principles are based on a consistent body of law that goes back over 50 years (*see e.g., Yonkers Community Dev. Agency v Morris*, 37 NY2d 478, 484, 335 N.E.2d 327, 373 N.Y.S.2d 112 [1975] ["extensive authority to make the initial determination that an area qualifies for renewal as 'blighted' has been vested in the agencies and municipalities; courts may review their findings only on a limited basis"]; *see also Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 425, 494 N.E.2d 429, 503 N.Y.S.2d 298 [1986]; *Kaskel v Impellitteri*, 306 NY 73, 78, 115 N.E.2d 659 [1953], *cert denied* 347 U.S. 934, 74 S. Ct. 629, 98 L. Ed. 1085 [1954]). Thus, a court may only substitute its own judgment for that of the legislative body authorizing

the project when such judgment is irrational or baseless (*see Matter of Goldstein*, 13 NY3d at 527).

Applying this standard of review, as we must, we now look to the relevant statute. The UDC Act provides that, in the case of land use improvement projects, ESDC must find:

> "(1) That the area in which the project is to be located is a substandard or insanitary area, or is in danger of becoming a substandard or insanitary area and tends to impair or arrest the sound growth and development of the municipality;
>
> (2) That the project consists of a plan or undertaking for the clearance, replanning, reconstruction and rehabilitation of such area and for recreational and other facilities incidental or appurtenant thereto;
>
> (3) That the plan or undertaking affords maximum opportunity for participation by private enterprise, consistent with the sound needs of the municipality as a whole"

(Uncons Laws § 6260 [c]). The term "substandard or insanitary area" is defined as "a slum, blighted, deteriorated or deteriorating area, or an area which has a blighting influence on the surrounding area" (Uncons Laws § 6253 [12]). Here, the two reports prepared by ESDC consultants — consisting of a voluminous

compilation of documents and photographs of property conditions — arrive at the conclusion that the area of the Project site is blighted. Just as in *Matter of Goldstein*, "all that is at issue is a reasonable difference of opinion as to whether the area in question is in fact substandard and insanitary," which is "not a sufficient predicate . . . to supplant [ESDC's] determination" (13 NY3d at 528).

Thus, given our precedent, the de novo review of the record undertaken by the plurality of the Appellate Division was improper. On the "record upon which the ESDC determination was based and by which we are bound" (*id.* at 517, citing *Matter of Levine v New York State Liq. Auth.*, 23 NY2d 863, 864, 245 N.E.2d 804, 298 N.Y.S.2d 71 [1969]), it cannot be said that ESDC's finding of blight was irrational or baseless. Indeed, ESDC considered a wide range of factors including the physical, economic, engineering and environmental conditions at the Project site. Its decision was not based on any one of these factors, but on the Project site conditions as a whole. Accordingly, since there is record support — "extensively documented photographically and otherwise on a lot-by-lot basis" (*id.* at 526) — for ESDC's determination that the Project site was blighted, the Appellate Division plurality erred when it substituted its view for that of the legislatively designated agency.

III.

Despite the objective data utilized by ESDC in its finding of blight, petitioners conclusorily assert that

ESDC acted in "bad faith" and with pretext when it arrived at its determination (*see generally Matter of Jackson*, 67 NY2d at 425; *Kaskel*, 306 NY at 79). Petitioners and the plurality at the Appellate Division particularly take umbrage at ESDC's decision to hire AKRF to conduct a neighborhood conditions study because Columbia had previously engaged AKRF to prepare its EIS. Here, the record does not support petitioners' contention that the study conducted by AKRF was compromised simply because it separately prepared an EIS on behalf of Columbia.

Moreover, ESDC — as a measure of caution and in response to criticism of its choice to retain AKRF — hired a second consulting firm, Earth Tech, to conduct review of the Project site. This company arrived at conclusions similar to AKRF's. Contrary to petitioners' assertions, Earth Tech did not merely review and rubber stamp AKRF's study, but conducted its own independent research and gathered separate data and photographs of the area before arriving at its own conclusions. Further, unlike AKRF, Earth Tech had never previously been affiliated with or employed by Columbia. Simply put, petitioners' argument that ESDC acted in "bad faith" or pretextually is unsubstantiated by the record.

IV.

In addition to attacking the neighborhood blight studies and ESDC's determination based on those studies, petitioners also challenge the constitutionality

of the statutory term "substandard or insanitary area" (*see* Uncons Laws §§ 6253 [12] and 6260 [c] [1]). They argue that we should find this term void for vagueness. This contention is likewise unpersuasive.

It has long been settled that "civil as well as penal statutes can be tested for vagueness under the due process clause" (*Montgomery v Daniels*, 38 NY2d 41, 58, 340 N.E.2d 444, 378 N.Y.S.2d 1 [1975], citing *Giaccio v Pennsylvania*, 382 U.S. 399, 402, 86 S. Ct. 518, 15 L. Ed. 2d 447 [1966]). Due process requires that a statute be sufficiently definite "so that individuals of ordinary intelligence are not forced to guess at the meaning of statutory terms" (*Foss v City of Rochester*, 65 NY2d 247, 253, 480 N.E.2d 717, 491 N.Y.S.2d 128 [1985]; *see also People v Stuart*, 100 NY2d 412, 420, 797 N.E.2d 28, 765 N.Y.S.2d 1 [2003]). In the context of eminent domain cases, we have held that, to guard against discriminatory application of the law, it is not necessary that "the degree of deterioration or precise percentage of obsolescence or mathematical measurement of other factors be arrived at with precision" (*Yonkers Community Dev. Agency*, 37 NY2d at 484).

Indeed, in *Yonkers Community Dev. Agency*, we recognized that "[m]any factors and interrelationships of factors may be significant" for a blight finding and:

> "may include such diverse matters as irregularity of the plots, inadequacy of the streets, diversity of land ownership making assemblage of property difficult, incompatibility

> of the existing mixture of residential and industrial property, overcrowding, the incidence of crime, the lack of sanitation, the drain an area makes on municipal services, fire hazards, traffic congestion, and pollution"

(*id.* at 483). Not only has this Court, but the Supreme Court has consistently held that blight is an elastic concept that does not call for an inflexible, one-size-fits-all definition (*see Berman v Parker*, 348 U.S. 26, 33-34, 75 S. Ct. 98, 99 L. Ed. 27 [1954]). Rather, blight or "substandard or insanitary areas," as we held in *Matter of Goldstein* and *Yonkers Community Dev. Agency*, must be viewed on a case-by-case basis. Accordingly, because the UDC Act provides adequate meaning to the term "substandard or insanitary area," we reject petitioners' argument that the statute is unconstitutionally vague on its face.

V.

On appeal to the Appellate Division, petitioners argued that there were no findings of blight in the Project site prior to Columbia's acquisition of property there. Despite the objective data in the record to the contrary, the Appellate Division plurality agreed stating that there was "no evidence whatsoever that Manhattanville was blighted prior to Columbia gaining control over the vast majority of property therein" (72 AD3d at 16). This argument is unsupported by the record.

In determining that Columbia created the blighted conditions in West Harlem, the plurality of the Appellate Division disregarded the Urbitran blight study commenced in 2003. That study, made at EDC's request and not ESDC's, was based on a survey of the Project site and surrounding neighborhood at a time when Columbia was only beginning to purchase property in the area. Indeed, the Urbitran study unequivocally concluded that there was "ample evidence of deterioration of the building stock in the study area" and that "substandard and unsanitary conditions were detected in the area." Moreover, Earth Tech found that, since 1961, the neighborhood has suffered from a long-standing lack of investment interest. Thus, since there is record support that the Project site was blighted before Columbia began to acquire property in the area, the issue is beyond our further review.

VI.

We also conclude that ESDC properly qualified this Project, in the alternative, as a "civic project" within the meaning of the UDC Act. Of course, ESDC is statutorily empowered to exercise eminent domain in furtherance of a civic project regardless of whether a project site suffers from blight. A civic project is defined as "[a] project or that portion of a multi-purpose project designed and intended for the purpose of providing facilities for *educational*, cultural, recreational, community, municipal, public service or other civic purposes" (Uncons Laws § 6253 [6] [d] [emphasis added]). Moreover, under Section 6260 (d) of the UDC

Act, ESDC is "empowered to undertake the acquisition, construction, reconstruction, rehabilitation or improvement of a [civic] project" if it finds:

> "(1) That there exists in the area in which the project is to be located, a need for the *educational*, cultural, recreational, community, municipal, public service or other civic facility to be included in the project;
>
> (2) That the project shall consist of a building or buildings or other facilities which are suitable for *educational*, cultural, recreational, community, municipal, public service or other civic purposes"

(Uncons Laws § 6260 [d] [emphasis added]).

The plurality at the Appellate Division held that the expansion of a private university does not qualify as a "civic purpose." This conclusion does not have statutory support. Indeed, there is nothing in the statutory language limiting a proposed educational project to public educational institutions. In fact, the UDC Act encourages participation in projects by private entities (*see* Uncons Laws § 6252 ["it is further declared to be the policy of the state to promote . . . sound growth and development of our municipalities . . . through . . . redevelopment . . . of [blighted] areas [and] . . . the undertaking of public and *private improvement programs* related thereto, including the provision of educational, recreational and cultural facilities, and the

encouragement of participation in these programs by *private enterprise*"] [emphasis added]; *see also* Uncons Laws § 6260 [d] [3]). Thus, there is no reason to depart from the plain meaning of the word "education" by limiting the term to public institutions.

Moreover, consonant with the policy articulated in the UDC Act, ESDC has a history of participation in civic projects involving private entities. The most recent example of a civic project is the Atlantic Yards project, which authorized a private entity to construct and operate an arena for the Nets professional basketball franchise (*see Matter of Develop Don't Destroy (Brooklyn) v Urban Dev. Corp.*, 59 AD3d 312, 874 N.Y.S.2d 414 [1st Dept 2009], *lv denied* 13 NY3d 713, 921 N.E.2d 609, 893 N.Y.S.2d 841 [2009]). The petitioners in that case argued that the project did not qualify as a "civic project" because the arena would be used by a professional basketball team and operated by a private profit-making entity. In rejecting that argument, the Appellate Division explained, "that a sports arena, even one privately operated for profit, may serve a public purpose" (*id.* at 325). Looking to the plain language of the UDC Act (*see* Uncons Laws § 6260 [d]), the court observed that "the proposed arena will serve a public purpose by providing a needed recreational venue in the area of the project" (*id.*).

The proposed Project here is at least as compelling in its civic dimension as the private development in *Matter of Develop Don't Destroy (Brooklyn)*. Unlike the Nets basketball franchise, Columbia University, though

private, operates as a non-profit educational corporation. Thus, the concern that a private enterprise will be profiting through eminent domain is not present. Rather, the purpose of the Project is unquestionably to promote education and academic research while providing public benefits to the local community. Indeed, the advancement of higher education is the quintessential example of a "civic purpose" (*see Cornell Univ. v Bagnardi*, 68 NY2d 583, 593, 503 N.E.2d 509, 510 N.Y.S.2d 861 [1986] [recognizing that schools, both public and private, "serve the public's welfare and morals"]). It is fundamental that education and the expansion of knowledge are pivotal government interests. The indisputably public purpose of education is particularly vital for New York City and the State to maintain their respective statuses as global centers of higher education and academic research. To that end, the Project plan includes the construction of facilities dedicated to research and the expansion of laboratories, libraries and student housing.

In addition to these new educational facilities, the Project will bestow numerous other significant civic benefits to the public. For example, the Project calls for the development of approximately two acres of gate-less, publicly accessible park-like and landscaped space as well as an open-air market zone along 12th Avenue. Other civic benefits include upgrades in transit infrastructure and a financial commitment to the West Harlem Piers Park. Moreover, this Project is projected to stimulate job growth in the local area. In addition to hiring 14,000 people for construction at the Project site,

Columbia estimates that it will accommodate 6,000 permanent employees once the Project site is completed. In sum, there can be no doubt that the Project approved by ESDC — which provides for the expansion of Columbia's educational facilities and countless public benefits to the surrounding neighborhood, including cultural, recreational and job development benefits — qualifies as a "civic project" under the UDC Act.[9]

VII.

Petitioners finally contend that they were denied procedural due process when ESDC both failed to turn over certain documents during the administrative process pursuant to their FOIL request and closed the record prior to completion of the FOIL litigation. Because ESDC did not withhold any documents that formed part of the administrative record and because petitioners are not entitled to discovery under article two of the EDPL, we, too, reject this argument as lacking merit.[10]

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9. Since the constitutionality of the UDC Act pertaining to "civic projects" is not challenged by petitioners, we respectfully disagree with our concurring colleague that it should be addressed here. Moreover, we do not believe that anything in our opinion could reasonably be construed to mean that "private tennis camps or karate schools" or "private casinos or adult video stores" would qualify as a "civic project" within the meaning of the UDC Act (*see* concurring op., at 3).

10. The procedural due process protections contained within the EDPL include the right to a public hearing and

(continued)

Appendix A

It is well settled that procedural due process in the context of an agency determination requires that the agency provide an opportunity to be heard in a meaningful manner at a meaningful time (*see Mathews v Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 [1976]). In this case, petitioners had an opportunity to comment on the proposed Project in a meaningful manner — both orally and through written submissions

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(continued)

adequate notice of that hearing. With respect to notice, EDPL § 202 (A) provides in relevant part: "Where a public hearing is required by this article the condemnor shall give notice to the public of the purpose, time and location of its hearing setting forth the proposed location of the public project including any proposed alternate locations, at least ten but no more than thirty days prior to such public hearing by causing such notice to be published in at least five successive issues of an official daily newspaper if there is one designated in the locality where the project will be situated and in at least five successive issues of a daily newspaper of general circulation in such locality. If the official newspaper is one of general circulation in such locality, publication therein as specified shall be deemed sufficient compliance." The scope of the public hearing required under the EDPL is addressed in § 203 of the statute. It states, in pertinent part: "At the public hearing the condemnor shall outline the purpose, proposed location or alternate locations of the public project and any other information it considers pertinent, including maps and property descriptions of the property to be acquired and adjacent parcels. Thereafter, any person in attendance shall be given a *reasonable opportunity to present an oral or written statement and to submit other documents concerning the proposed public project*. A record of the hearing shall be kept, including written statements submitted" (emphasis added).

— and at a meaningful time — well before ESDC issued its findings and determination to acquire petitioners' property by eminent domain.

It should be emphasized that prior to the ESDC determination, respondents had unfettered access to over 8,000 pages of documents including, most significantly, the GPP (as initially adopted by ESDC), the FEIS, and the AKRF and Earth Tech neighborhood conditions studies. All of these documents were available to the public during the comment period pursuant to EDPL § 203. Indeed, petitioners' substantial opportunity to be heard is reflected in their extensive written submissions after the completion of the two-day public hearing. As a result, ESDC prepared 75 pages of detailed responses to petitioners' comments and duly considered their submissions before rendering its final findings and determination (*see Vil. Auto Body Works, Inc. v Incorporated Vil. of Westbury*, 90 AD2d 502, 503, 454 N.Y.S.2d 741 [2d Dept 1982] [where a party has an opportunity to raise claims at a public hearing, there is no denial of procedural or substantive due process]).

It is true that, in the separate FOIL proceedings that were litigated during and after this administrative process, we ultimately ruled in favor of petitioner TIA and ordered ESDC to turn over five additional documents related to ESDC's July 2004 agreement with Columbia (*see Matter of West Harlem Bus. Group*, 13 NY3d at 886). However, even if petitioners were legally entitled to the documents under FOIL at the time of the public hearing, a FOIL violation does not establish

a due process violation. Indeed, the due process protections embodied in the EDPL do not even allow for discovery[11]. Rather, in enacting the EDPL, the Legislature clearly evinced an intent for expeditious review of agency determinations, not a trial-like hearing process, by placing, for example, original jurisdiction of these proceedings in the Appellate Division and setting a short statute of limitations (*see Matter of Jackson*, 67 NY2d at 424).[12]

To establish that a FOIL violation rose to the level of a due process violation, petitioners "must show that the withholding of the [documents] caused [them] prejudice" (*Adams v United States*, 673 F Supp 1249, 1260 [SDNY 1987]). Here, petitioners have not met their burden, neither explaining how they were deprived of a meaningful opportunity to be heard during the

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11. *See supra* note ten.

12. Prior to enactment of the EDPL, a Commission established to evaluate our State's eminent domain law and procedures recognized the balance between judicial review and the "deleterious effects of prolonged litigation" (*Matter of Goldstein*, 13 NY3d at 534 [Read, J. concurring]). The Commission specifically noted: "Nor should the construction of public projects be brought to a standstill, as the need for public projects in an advanced urban society is essential. In addition to the problem of a legal blockage of project, is the fact that the resort to the courts for a review of project's possible adverse effects results in a lengthy period of delay before ultimate disposition" (*id.*, quoting State Commission on Eminent Domain, *1971 Report of the State Commission on Eminent Domain*, February 1, 1972, at 16 [1971 Report]).

administrative process nor demonstrating the materiality of the records sought through FOIL.

Moreover, "petitioners fail to explain why they failed to bring a motion to vacate the automatic stay" pursuant to CPLR 5519 (c) following the Appellate Division order in their favor that granted their FOIL requests (72 AD3d at 35 [Tom, J. dissenting]). Indeed, the dissenting Justices at the Appellate Division below recognized that:

> "A CPLR 5519 (c) application would have afforded the Court with the opportunity to assess whether petitioners could demonstrate the likelihood of success on the merits . . . and that such documents were material to ESDC's determination and, thus, essential to affording petitioners procedural due process"

(*id.*). We thus reject petitioners' assertion that they were denied procedural due process.

In sum, we give deference to the findings and determination of the ESDC that the Project qualifies as both a land use improvement project and as a civic project serving a public purpose under the UDC Act. We further conclude that petitioners were not deprived of procedural due process.

Accordingly, the order of the Appellate Division should be reversed, with costs, and the petitions should be dismissed.

Appendix A

CONCUR BY: SMITH

CONCUR

SMITH, J. (concurring):

I concur in the result on constraint of *Matter of Goldstein v New York State Urban Dev. Corp.* (13 NY3d 511, 921 N.E.2d 164, 893 N.Y.S.2d 472 [2009]). The finding of "blight" in this case seems to me strained and pretextual, but it is no more so than the comparable finding in *Goldstein*. Accepting *Goldstein* as I must, I agree in substance with all but section VI of the majority opinion.

Section VI is unnecessary to the result we reach. Once we have decided that the removal of urban blight provides a sufficient constitutional basis for the taking, and that the project is a "land use improvement project" within the meaning of the UDC Act, there is no reason to consider UDC's alternative argument that the taking may also be justified as one for a "civic project." The majority gratuitously decides to reach this question — and then confuses matters by addressing only the statutory, not the constitutional, aspect of ESDC's alternative argument.

The "civic project" issue would be significant in this case only if we rejected the idea that blight removal justifies the taking. But if we did reject the blight rationale, we would have to consider whether this taking can be characterized as being for "public use" on some

other ground — an issue the majority does not discuss. Rather, the majority discusses the statutory definition of "civic project" in a vacuum, as though there were no possible constitutional limitation on the breadth of that term. When we interpret a statute, we should at least consider whether the interpretation we adopt raises constitutional problems.

The statutory definition of "civic project" is "[a] project or that portion of a multi-purpose project designed and intended for the purpose of providing facilities for educational, cultural, recreational, community, municipal, public service or other civic purposes" (Unconsolidated Laws § 6253 [6] [d]). The majority seems to read this definition as broadly as its literal language permits. It implies that any public or private activity that can fairly be called educational — or, by implication, cultural or recreational and so forth — will qualify a project as "civic." Surely this approach will, in some imaginable cases, cause the statute to be unconstitutional as applied: would anyone seriously suggest, for example, that private tennis camps or karate schools ("educational" uses), or private casinos or adult video stores ("recreational" uses), qualify as "public" uses in the constitutional sense?

It is clear to me that attention to constitutional constraints would require a narrower reading of the term "civic project" than the one the majority adopts. Since the majority pays no attention to those constraints, I do not join section VI of its opinion.

* * * *

Order reversed, with costs, and petitions dismissed. Opinion by Judge Ciparick. Chief Judge Lippman and Judges Graffeo, Read, Pigott and Jones concur. Judge Smith concurs in result in an opinion.

Decided June 24, 2010

APPENDIX B — DECISION OF THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT DECIDED AND ENTERED ON DECEMBER 3, 2009

In re Parminder *Kaur*, et al.,

Petitioners,

v

New York State Urban Development Corporation, etc.,

Respondent.

In re Tuck-It-Away, Inc., et al.,

Petitioners,

v

New York State Urban Development Corporation, etc.,

Respondent.

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OPINION BY: James M. Catterson

OPINION

In these proceedings, the petitions challenge the determination of respondent New York State Urban

Appendix B

Development Corporation d/b/a Empire State Development Corporation, dated December 18, 2008, which approved the acquisition of certain real property for the project commonly referred to as the Columbia University Educational Mixed Use Development Land Use Improvement and Civic Project.

CATTERSON, J.

"An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority [...] A few instances will suffice to explain what I mean [...] [A] law that takes property from A and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it. The genius, the nature, and the spirit, of our State Government, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them." *Calder v. Bull, 3 U.S. 386, 388, 3 Dall. 386, 388, 1 L.Ed. 648 (1798).*[1]

The exercise of eminent domain power by the New York State Urban Development Corporation d/b/a Empire State Development Corporation (hereinafter referred to as "ESDC") to benefit a private elite

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1. The beginning of Justice O'Connor's dissent in *Kelo v. City of New London (545 U.S. 469, 494, 125 S.Ct. 2655, 162 L.Ed.2d 439, 460-462 (2005))* quotes extensively from this passage. However, one need not adopt her dissenting position to agree with the powerful warning of Justice Chase in *Calder*.

education institution is violative of the Takings Clause of the U.S. Constitution, article 1, § 7 of the New York Constitution, and the "first principles of the social contract." The process employed by ESDC predetermined the unconstitutional outcome, was bereft of facts which established that the neighborhood in question was blighted, and ultimately precluded the petitioners from presenting a full record before either the ESDC or, ultimately, this Court. In short, it is a skein worth unraveling.

THE TAKING OF MANHATTANVILLE

This case involves the acquisition, by condemnation or voluntary transfer, of approximately 17 acres in the Manhattanville area of West Harlem for the development of a new campus for Columbia University, a not for profit corporation (hereinafter referred to as "The Project"). The Project, referred to as the Columbia University Educational Mixed Used Development Land Use Improvement and Civic Project, would consist of a total of approximately 6.8 million gross square feet in up to 16 new buildings, a multi-level below-grade support space, and the adaptive re-use of an existing building. In addition, the Project would purportedly create approximately two acres of publicly accessible open space, a market along Twelfth Avenue, and widened, tree-lined sidewalks.

The Project site is bounded by and includes West 125th Street on the south, West 133rd Street on the north, Broadway and Old Broadway on the east, and

Twelfth Avenue on the west, as well as certain areas located beneath City streets within this area and beneath other City streets in the Project site. The estimated acquisition and construction cost for the Project is $ 6.28 billion, and will be funded by Columbia without any contribution from any municipal entity.

In 2001, Columbia, together with numerous other organizations, began working with the New York City Economic Development Corporation (hereinafter referred to as "EDC") to redevelop the West Harlem area. In August 2002, the EDC issued a West Harlem Master Plan (hereinafter referred to as the "Plan") describing the economic redevelopment plan. In the Plan, the EDC contended that the area was "once denser, livelier and a waterside gateway for Manhattan," and that "[a] renewed future seem[ed] possible." The EDC stated that it hoped to "revitaliz[e] [...] a long-forsaken waterfront," provide transportation, develop "a vibrant commercial and cultural district," and support academic research. The EDC noted that the current land use was "auto-related or vacant," with several "handsome, mid-rise buildings [...] interspersed with parking lots and partially empty industrial buildings." According to data prepared for the Plan by Ernst & Young, 54 of the 67 lots were in "good," "very good" or "fair" condition.

In 2000, Columbia owned only 2 properties in the Project area. In 2002, Columbia began purchasing property in the area in order to effectuate its own plan to expand its facilities. By early October 2003, Columbia

controlled 51% of the property in the Project area - 33% of which was still privately owned.

As early as March 2004, ESDC, EDC, and Columbia began meeting regarding the Project and the condemnation of land. In June 2004, Columbia hired Allee, King, Rosen and Fleming, Inc. (hereinafter referred to as "AKRF"), an environmental and planning consulting firm, to assist in its planning, to act as its agent in seeking approvals and determinations from various agencies necessary to realize its expansion plan, and to prepare an Environmental Impact Statement (hereinafter referred to as the "EIS"). *See Matter of Tuck-It-Away Assoc., L.P. v. Empire State Dev. Corp., 54 AD3d 154, 157, 861 N.Y.S.2d 51, 53-54 (1st Dept. 2008), lv. granted, 12 NY3d 708, 879 N.Y.S.2d 55, 906 N.E.2d 1089 (2009)*(hereinafter referred as "*Tuck-It-Away I*"). AKRF began attending meetings with Columbia, ESDC and EDC in connection with the Project.

On July 30, 2004, Columbia entered into an agreement with ESDC to pay the costs incurred by ESDC in connection with the Project. According to the agreement, Columbia owned or controlled, or expected to control, "a substantial portion of the lots within the" Project area.

In August 2004, EDC issued a "Blight Study" of the West Harlem/Manhattanville Area which was prepared by a consultant, Urbitran Associates, Inc. The study concluded that the area was "blighted."

Appendix B

In December 2004, the ESDC, not content to rest on the Urbitran study, noted that it would have to make its own "blight findings" in connection with the Project. In an e-mail dated January 7, 2005, Columbia's Project Manager, Lorinda Karoff of Karen Buckus and Associates, indicated that Columbia's attorneys "and also possibly AKRF (who has already reviewed the document once at EDC's offices), wished to see the draft blight study." Karoff noted that the draft study "may change or even be completely replaced as ESDC uses different standards than the City."

In or about September 2006, ESDC retained Columbia's consultant AKRF to evaluate the conditions at the Project site. AKRF in turn retained Thornton Tomassetti, Inc., an engineering firm, to inspect and evaluate the physical condition of each existing structure at the Project site.

On November 1, 2007, AKRF issued its Manhattanville Neighborhood Conditions Study (hereinafter referred to as "AKRF's study"). The study noted that as of April 30, 2007, Columbia owned or had contracted to purchase 48 of the 67 tax lots (72 percent) in the study area. The study found that "48 of the 67 lots in the study area (or 72 percent of the total lots) have one or more substandard condition, including poor or critical physical lot conditions, a vacancy rate of 25 percent or more, or site utilization of 60 percent or less." In addition, the study found that "34 of the 67 lots in the study area (or 51 percent of the total lots) were assessed as being in poor or critical condition."

According to the study, "[t]he presence of such a high proportion of properties with multiple substandard conditions suggests that the study area has been suffering from a long-term trend of poor maintenance and disinvestment." The study concluded that the Project area was "substantially unsafe, unsanitary, substandard, and deteriorated."

On November 16, 2007, the New York City Planning Commission (hereinafter referred to as the "CPC"), the lead agency for the Project under the New York State Environmental Quality Review Act (hereinafter referred to as the "SEQRA") and the City's Environmental Quality Review Act (hereinafter referred to as the "CEQRA"), issued a notice of completion for the Project's final environmental impact statement (hereinafter referred to as the "FEIS"). On November 26, 2007, CPC issued its findings on the FEIS pursuant to both SEQRA and CEQRA.

After a public hearing held by the City Council on December 12, 2007, the Council approved the rezoning of approximately 35 acres of West Harlem including the 17-acre Project site. Meanwhile, West Harlem Business Group (hereinafter referred to as "WHBG"), a group of businesses within the Project area, as well as Tuck-It-Away Associates, L.P., a member of WHBG, requested various documents from the ESDC related to the Project pursuant to the Freedom of Information Law (hereinafter referred to as "FOIL"). When the ESDC refused to provide certain documents, WHBG and TIA filed article 78 petitions. *See Tuck-It-Away I, 54 AD3d at 159, 861 N.Y.S.2d at 55.*

Appendix B

On July 3, 2007 and on or about August 23, 2007, the New York County Supreme Court (Shirley Werner Kornreich, J.), granted the applications to compel ESDC to release the documents, including documents involving ESDC's communications with AKRF. In particular, the court found that an agency exemption did not apply to the AKRF documents since AKRF lacked "sufficient neutrality" due to its role as a consultant for both the ESDC and Columbia. The ESDC appealed from those orders.

On July 15, 2008, this Court affirmed Supreme Court's order for disclosure of documents related to ESDC's communications with AKRF, and otherwise reversed. *See Tuck-It-Away I, 54 AD3d at 162, 861 N.Y.S.2d at 57.* With respect to the AKRF documents, we agreed with Supreme Court that AKRF's representation of both ESDC and Columbia with respect to the Project "creates an inseparable conflict for purposes of FOIL." *54 AD3d at 164, 861 N.Y.S.2d at 58-59.* In particular, we found that "FOIL is not blind to the extensive record of the tangled relationships of Columbia, ESDC and their shared consultant, AKRF." *54 AD3d at 166, 861 N.Y.S.2d at 60.* Due to AKRF's consulting and advocacy work for Columbia, we questioned AKRF's ability to provide "objective advice" to the ESDC, particularly with respect to its preparation of the blight study. *Id., 861 N.Y.S.2d at 60.*

In response to the concerns about AKRF's neutrality, on February 7, 2008, approximately two months after we heard oral argument on the FOIL

litigation, Carter Ledyard & Milburn LLP, acting on behalf ESDC, retained Earth Tech, Inc., an engineering and environmental consultant, to "audit, examine and evaluate" AKRF's study. Pursuant to that agreement, Earth Tech was "not now providing services to" Columbia and was prohibited from "perform[ing] any services for Columbia throughout the duration of th[e] Agreement." While the agreement is not an admission that AKRF was thoroughly compromised in its representation of both ESDC and Columbia, it is nonetheless an acutely transparent attempt to inoculate Earth Tech and ESDC from the damage done by AKRF.

In May 2008, almost six years after EDC issued the West Harlem Master Plan, and five years after Columbia gained control of more than one half of the realty contained in the project area, Earth Tech issued a Manhattanville Neighborhood Conditions Study. According to that study, Earth Tech "independently reviewed" AKRF's study as well as Thornton Tomasetti's findings relating to the structural conditions of the buildings in the Project site. As part of its review, Earth Tech inspected and assessed the 67 lots on the Project site, "surveyed the study area," and "conducted various searches of public data bases on environmental contamination, Building Code violations, and ownership records." It bears repeating that, by this time, Columbia either owned or was in contract to purchase 48 of those 67 lots.

According to the Earth Tech study, Earth Tech's "independently arrived at findings substantially

confirm[ed] those of AKRF and Thornton Tomasetti." However, Earth Tech found that certain buildings had "further deteriorated since the prior inspections." In particular, while the AKRF report had found that 34 lots (51%) were in critical or poor condition, Earth Tech found that 37 sites (55%) were in critical or poor condition. In addition, Earth Tech found a "long-standing lack of investor interest in the neighborhood," demonstrated by, among other things, the paucity of new buildings constructed since 1961, as well as "the extended neglect of building maintenance" and extensive Building Code violations. In particular, Earth Tech found that, as of July 2006, "there were 410 open violations" with respect to 75% of the lots in the Project site. Accordingly, Earth Tech concluded that a majority of the buildings and lots in the Manhattanville area exhibited "substandard and deteriorated conditions" creating "a blighted and discouraging impact on the surrounding community."

On July 17, 2008, the ESDC adopted a General Project Plan (hereinafter referred to as the "GPP") for the Project as both a land use improvement project and a civic project in accordance with the New York State Urban Development Corporation Act.

By notice dated August 3, 2008, ESDC advised the public that they would conduct a hearing on September 2 and 4, 2008 in connection with the proposed Project and acquisition of property within the Project site. The petitioners and others spoke at the hearing. The record of the hearing remained open for any additional written comments until October 10, 2008.

Appendix B

On December 18, 2008, ESDC approved its SEQRA statement of findings, adopted a modified GPP, and authorized the issuance of the determination and findings. On December 22, 2008, ESDC issued its determination and findings authorizing the acquisition of certain real property for the Project. In particular, ESDC found that "[t]he Project qualifies as both a Land Use Improvement Project and separately and independently as a Civic Project pursuant to the New York State Urban Development Corporation Act."

On February 20, 2009, two petitions were filed in this Court challenging the determination and findings. The petitioners Tuck-It-Away, Inc., Tuck-It-Away Bridgeport, Inc., Tuck-It-Away at 133rd Street, Inc. and Tuck-It-Away Associates, L.P. are owners of storage facilities located at 3261 Broadway, 614 West 131st Street, 655 West 125th Street, and 3300 Broadway. Petitioners Parminder Kaur and Amanjit Kaur are the owners of a gasoline service station located at 619 West 125th Street, and petitioner P.G. Singh Enterprises, LLP is the owner of a gasoline service station located at 673 West 125th Street. It is uncontested that the petitioners' property is within the Project site and thus is subject to condemnation.

THE STANDARD OF REVIEW

In reviewing the determination and findings in these Eminent Domain Procedure Law (EDPL) proceedings this Court's scope of review is limited to whether (1) the proceeding was in conformity with the federal and state

constitutions; (2) the proposed acquisition was within the condemnor's statutory jurisdiction or authority; (3) the condemnor's determination and findings were made in accordance with procedures set forth in EDPL article two and article eight of the Environmental Conservation Law ("SEQRA"); and (4) a public use, benefit or purpose will be served by the proposed acquisition. *See EDPL § 207[C].*

A negative finding in any one of these factors necessarily dooms ESDC's determinations. The petitioners assert that the ESDC exceeded its statutory authority in designating the Project as a "Civic Project" under the Urban Development Corporation Act (hereinafter referred to as "UDCA") (L 1968, ch 174, § 1, as amended) (McKinney's Uncons Laws of N.Y. § 6252 *et seq.*). In addition, the petitioners assert that the alleged "civic" benefits of the Project are insufficient public purposes for the use of eminent domain. In particular, the petitioners assert that the expansion of a private university does not qualify as a "civic project" nor as a public purpose to justify the use of eminent domain under the EDPL. In addition, the petitioners assert that the other purported "civic purposes" and public benefits of the Project do not qualify as public purposes to justify condemnation or the designation of the project as a "civic project" since some of the purported benefits (1) arise from preexisting obligations of Columbia; (2) primarily benefit Columbia; and (3) are pretextual, unrelated to the use of the Project or are *de minimis* in value.

Appendix B

ESDC's determination that the project has a public use, benefit or purpose is wholly unsupported by the record and precedent. A public use or benefit must be present in order for an agency to exercise its power of eminent domain. *See U.S. Const. 5th amend*; *NY Const. art. I, § 7*; *EDPL 204[B][1]*). "[T]he term public use' broadly encompasses any use [...] which contributes to the health, safety and general welfare of the public." *See Matter of C/S 12th Ave. LLC v. City of New York, 32 AD3d 1, 10-11, 815 N.Y.S.2d 516, 525 (1st Dept. 2006)*. If an adequate basis for the agency's determination is shown, and the petitioner cannot show that the determination was corrupt or without foundation, the determination should be confirmed. *See Matter of Waldo's, Inc. v. Village of Johnson City, 74 N.Y.2d 718, 720, 544 N.Y.S.2d 809, 810, 543 N.E.2d 74, 75 (1989)*; *Matter of Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400, 425, 503 N.Y.S.2d 298, 310, 494 N.E.2d 429, 441 (1986)*; *Kaskel v. Impellitteri, 306 N.Y. 73, 78, 115 N.E.2d 659, 661 (1953), cert. denied, 347 U.S. 934, 74 S. Ct. 629, 98 L. Ed. 1085 (1954)*.

The UDCA defines a "civil project" as: "[a] project or that portion of a multi-purpose project designed and intended for the purpose of providing facilities for educational, cultural, recreational, community, municipal, public service or other civic purposes." Uncons. Laws of N.Y. § 6253(6)(d) (UDCA 3(6)(d)).

At the outset, it is important to note that as late as May 18, 2006, 2 1/2 years into ESDC's participation project planning, the draft GPP still identified the

project only as the "Manhattanville in West Harlem Land Use Improvement Project" even though there was no arguably independent blight study until May 2008. It was not until September 2006 that the project had "and Civic Project" added to its title, fully two years after Columbia agreed to wholly underwrite the project.

THE *KELO* DOCTRINE MANDATES

Any analysis of the constitutionality of ESDC's scheme for the development of Manhattanville must necessarily begin with a discussion of the most recent Taking Clause exposition by the U.S. Supreme Court in *Kelo v. City of New London. 545 U.S. 469, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005).*

It is recognized that *Kelo*, as described below, did not concern an area characterized as "blighted." However, the blight designation in the instant case is mere sophistry. It was utilized by ESDC years after the scheme was hatched to justify the employment of eminent domain but this project has always primarily concerned a massive capital project for Columbia. Indeed, it is nothing more than economic redevelopment wearing a different face. "[E]ven where the law expressly defines the removal or prevention of blight' as a public purpose and leaves to the agencies wide discretion in deciding what constitutes blight, facts supporting such determination should be spelled out." *Yonkers Community Development Agency v. Morris, 37 N.Y.2d 478, 484, 373 N.Y.S.2d 112, 119, 335 N.E.2d 327, 332 (1975), appeal dismissed, 423 U.S. 1010, 96 S.*

Ct. 440, 46 L. Ed. 2d 381 (1975). Furthermore, "[c]arefully analyzed, it is clear that in such situations, courts are required to be more than rubber stamps in the determination of the existence of substandard conditions in urban renewal condemnation cases. The findings of the agency are not self-executing. A determination of public purpose must be made by the courts themselves and they must have a basis on which to do so." *Yonkers, 37 N.Y.2d at 485, 373 N.Y.S.2d at 120, 335 N.E.2d at 333; see Matter of City of Brooklyn, 143 N.Y. 596, 618, 38 N.E. 983, 989 (1894), aff'd, 166 U.S. 685, 17 S.Ct. 718, 41 L.Ed. 1165 (1897)* ("But whether the use for which the property is to be taken, is a public use, which justifies its appropriation, is a judicial question; upon which the courts are free to decide.")

The determination of the *Yonkers* Court and the hoary authority of *City of Brooklyn* are still controlling precedent that require this Court not to abdicate its role to decide a "judicial question." Whether the respondents describe the use of eminent domain in Manhattanville as "urban renewal" or economic redevelopment, the question of public purpose or public use should be analyzed under the standards set out in *Kelo*.

In *Kelo*, the City of New London, a municipal corporation, and the New London Development Corporation attempted to use state law to take land to build and support economic revitalization of the city's downtown area known as Fort Trumbull. In its plan, New London divided the development into seven parcels with

some of these parcels destined to be public waterways or museums. One parcel, known as Lot 3, was designated to be a 90,000 square foot high-technology research and development office complex and parking facility ultimately for the use of Pfizer Pharmaceutical Company.

Several plaintiffs in Lot 3 challenged the taking of their property. They claimed that the condemnation of unblighted land for economic development purposes violated both the state and federal constitutions. More specifically, they argued that the taking of private property under Connecticut's statute and handing it over to a private party did not constitute a valid public use, or at a minimum, the public benefit was incidental to the private benefits generated. The Connecticut Supreme Court rejected their claims under both the state and federal constitutions. The U.S. Supreme Court granted certiorari on the federal question of whether the taking of private property for economic development purposes, when it involved transferring land from one private owner to another, constituted a valid public use under the *Fifth* and *Fourteenth Amendments*.

Justice Stevens, writing for the four-Justice plurality, characterized the New London program as "economic rejuvenation":

> "The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the

> community, including - but by no means limited to - new jobs and increased tax revenue. As with other exercises in urban planning and development, the City is endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts. To effectuate this plan, the City has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development. Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in *Berman*, to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan." *545 U.S. at 483-484, 125 S.Ct. at 2665, 162 L.Ed.2d at 454* (footnote omitted) *citing Berman v. Parker, 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954).*

The plurality broke little new ground on this issue. In *Berman*, Justice Douglas, writing for the unanimous Court, upheld the District of Columbia's use of eminent domain via act of Congress to acquire, *inter alia*, commercial property that was, itself, not blighted. The Court stated that "[t]he concept of public welfare is broad and inclusive [...] [and] the power of eminent domain is merely the means to the end." *348 U.S. at 33, 75 S.Ct. at 102-103, 99 L.Ed.2d at 38.* The *Berman* Court

elaborated on the deference due to government decisions of this type:

> "[T]he means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. The public end may be as well or better served through an agency of private enterprise than through a department of government — or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects." *348 U.S. at 33-34, 75 S.Ct. at 103, 99 L.Ed.2d at 38* (internal citations omitted).

The *Kelo* plurality also relied heavily on *Hawaii Hous. Auth. v. Midkiff (467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984))*, wherein the Court upheld a Hawaii statute that authorized the taking, under eminent domain, of fee title from large land- holding lessors and transferring it to a series of lessees. The *Kelo* plurality stated that in "[r]eaffirming *Berman's* deferential approach to legislative judgments in this field, we concluded that the State's purpose of eliminating the social and economic evils of a land oligopoly' qualified as a valid public use." *545 U.S. at 482, 125 S.Ct. at 2664, 162 L.Ed.2d at 453, quoting Midkiff, 467 U.S. at 241-242, 104 S. Ct. at 2330, 81 L.Ed.2d at 198.*

The *Kelo* plurality reaffirmed the broad deference accorded to the legislature in determining what

constitutes a valid public use as first enunciated in *Berman*. However, Justice Kennedy, in a concurring opinion, pointed out the obligations of any court faced with challenges such as presented by ESDC's scheme to redevelop Manhattanville. He wrote specifically and separately on the issue of improper motive in transfers to private parties with only discrete secondary benefits to the public.

This is precisely the issue presented by the instant case. Justice Kennedy placed particular emphasis on the importance of the underlying planning process that ultimately called for the exercise of the power of eminent domain, and laid out in detail the elements of the New London plan that ensured against impermissible favoritism:

1. The city's awareness of its depressed economic condition, by virtue of a recent closing of a major employer and the state's designation of the city as a distressed municipality. *545 U.S. at 491, 125 S.Ct. at 2669, 162 L.Ed.2d at 459*; *cf. 545 U.S. at 473*.

2. The formulation of a comprehensive development plan meant to address a serious citywide depression. *Id. at 493, 125 S.Ct. at 2670, 162 L.Ed.2d at 460*.

3. The substantial commitment of public funds to the project before most of the private beneficiaries were known. *Id. at 491-492, 125 S.Ct. at 2669, 162 L.Ed.2d at 459*. 4. The city's review of a variety of development plans. *Id., 125 S.Ct. at 2669, 162 L.Ed.2d at 459*. 5. The

city's choice of a private developer from a group of applicants rather than picking out a particular transferee beforehand. *Id. 6.* The identities of most of the private beneficiaries being unknown at the time the city formulated its plan. *Id. at 493, 125 S.Ct. at 2670, 162 L.Ed.2d at 460.* 7. The city's compliance with elaborate procedural requirements that facilitate the review of the record and inquiry into the city's purposes. *Id.* Justice Kennedy specifically acknowledged that "[t]here may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause." *Id., 125 S.Ct. at 2670, 162 L.Ed.2d at 460.* Although he declined to conjecture as to what sort of case might justify a more demanding standard of scrutiny, beyond finding the estimated benefits there "not *de minimis*", it was the specific aspects of the New London planning process that convinced him to side with the plurality in deference to the legislative determination. *See Id.*

The contrast between ESDC's scheme for the redevelopment of Manhattanville and New London's plan for Fort Trumbull could not be more dramatic. Initially, it must be noted that unlike Fort Trumbull, Manhattanville or West Harlem as a matter of record was not in a depressed economic condition when EDC and ESDC embarked on their Columbia-prepared-and-financed quest. The 2002 West Harlem Master Plan stated that not only was Harlem experiencing a renaissance of economic development, but that the area had great development potential that could easily be

realized through rezoning. Again, its bears repeating that the only purportedly unbiased or untainted study that concluded that Manhattanville was blighted, and thus in need of redevelopment, was not completed until 2008; the point at which the ESDC/Columbia steamroller had virtually run its course to the fullest.

Unlike the City of New London, EDC, in conjunction with ESDC, did not endeavor to produce a comprehensive development plan to address a Manhattanville-wide economic depression. Furthermore, no municipal entity in New York committed any public funds for the redevelopment of Manhattanville. Indeed, Columbia underwrote *all* of the costs of studying and planning for what would become a sovereign sponsored campaign of Columbia's expansion. This expansion was not selected from a list of competing plans for Manhattanville's redevelopment. Indeed, the record demonstratesthat EDC committed to rezoning Manhattanville, not for the goal of general economic development or to remediate an area that was "blighted" before Columbia acquired over 50% of the property, but rather solely for the expansion of Columbia itself.

The only alternative considered was West Harlem Community Board 9's alternative 197-a plan. More than 10 years in the making, Community Board 9's self-initiated comprehensive plan explicitly sought integrated and diversified development of the Manhattanville industrial area so as to maximize economic benefits to local area residents rather than

just Columbia. That plan contemplated that Columbia would play an important role in the eventual redevelopment of Manhattanville. However, it explicitly rejected the use of eminent domain and exclusive Columbia control in favor of diversified development and preservation of existing businesses and jobs.

Until May 3, 2007, drafts of the Columbia GPP make no mention of Community Board 9's 197-a plan. ESDC appears to have first considered the 197-a plan in the October 12, 2007 draft of the GPP, whereupon it rejected the city building's plan on the ground that it "*does not meet Columbia's needs as Columbia had defined them.*" When the New York City Planning Commission adopted the 197-a plan, it carved out the area sought by Columbia because it did not provide Columbia "adequate opportunity to facilitate Columbia's long-term growth." The record shows no evidence that ESDC placed any constraints upon Columbia's plans, required any accommodation of existing, or competing uses, or any limitations on the scale or configuration of Columbia's scheme for the annexation of Manhattanville.

Thus, the record makes plain that rather than the identity of the ultimate private beneficiary being unknown at the time that the redevelopment scheme was initially contemplated, the ultimate private beneficiary of the scheme for the private annexation of Manhattanville was the progenitor of its own benefit. The record discloses that every document constituting the plan was drafted by the preselected private beneficiary's attorneys and consultants and architects, from the General Project Plan, the Special District

Zoning Text, the City Map Override Proposal, and the Land Use Restrictions to all phases of the environmental review. Even the blight study on which ESDC originally proposed to base its findings was prepared by Columbia's consultant AKRF, nominally retained by ESDC for the purpose, but which retention and use by ESDC was roundly condemned by this Court in *Tuck-it-Away I*.

In *Kelo*, the plurality assumed that the redevelopment in question was itself a public purpose. No such assumption should be made in the instant case despite the Columbia sponsored finding of blight.

THERE IS NO INDEPENDENT CREDIBLE PROOF OF BLIGHT IN MANHATTANVILLE

Under the UDCA, the ESDC is empowered to acquire property for a land use improvement project if it finds, in pertinent part, that "the area in which project is to be located is a substandard or insanitary area, or is in danger of becoming a substandard or insanitary area and tends to impair or arrest the sound growth and development of the municipality." Uncons. Laws 6260[c][1] (UDCA 10(c)(1)). The statute states, in relevant part, that "[t]he term substandard or insanitary area' shall mean and be interchangeable with a slum, blighted, deteriorated or deteriorating area, or an area which has a blighting influence on the surrounding area." Uncons. Laws 6253[12] (UDCA 3[12]. The statute's statement of legislative findings and purposes lists various "substandard, insanitary, deteriorated or deteriorating conditions" including, among other things:

> "obsolete and dilapidated buildings and structures, defective construction, outmoded design, lack of proper sanitary facilities or adequate fire or safety protection, excessive population density, illegal uses and conversions, inadequate maintenance, [and] buildings abandoned or not utilized in whole or substantial part[.]" Uncons. Laws § 6252 (UDCA 2).

It is important to note that the record before ESDC contains no evidence whatsoever that Manhattanville was blighted prior to Columbia gaining control over the vast majority of property therein. Only that evidence which was part of ESDC's record before it was closed on December 18, 2008 can be properly considered on the question of blight. *See Matter of Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d at 418, 503 N.Y.S.2d at 305* ("courts reviewing compliance with statutory requirements should consider whether the agency's conclusion is supported by substantial evidence in the record that was before the agency at the time of its decision").

Thus, the affidavits of Dr. R. Andrew Parker, Earth Tech's principal urban planner and of Philip Pitruzzello which were sworn to after the record was closed, cannot inform this Court's review of ESDC's determinations[2].

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2. It is ironic that the respondent has urged this Court to consider the Parker and Pitruzzello affidavits while simultaneously defending the closing of the record despite the petitioners' protests that it was incomplete.

ESDC's reliance on *CPLR 403(b)* is nothing more than an attempt to circumvent the plain language of *EDPL 207(A)* and the standard of review articulated in *Jackson*. Furthermore, the use of the subsequently crafted affidavits would preclude the petitioners from responding to the averments contained therein before the agency charged with the power of eminent domain.

It is critical to recognize that EDC's 2002 West Harlem Master Plan which was created prior to the scheme to balkanize Manhattanville for Columbia's benefit found no blight, nor did it describe any blighted condition or area in Manhattanville. Instead, as described above, the Plan noted that West Harlem had great potential for development that could be jump-started with re-zoning. It was only after the Plan was published in July 2002 that the rezoning of the "upland" area was essentially given over to the unbridled discretion of Columbia. In little more than a year from publication of the Plan, EDC joined with *Columbia* in proposing the use of eminent domain to allow Columbia to develop Manhattanville for Columbia's sole benefit.

This ultimately became the defining moment for the end game of blight. Having committed to allow Columbia to annex Manhattanville, the EDC and ESDC were compelled to engineer a public purpose for a quintessentially private development: eradication of blight.

From this point forward, Columbia proceeded to acquire by lease or purchase a vast amount of property

in Manhattanville. It is apparent from the record that ESDC had no intention of determining if Manhattanville was blighted prior to, or apart from Columbia's control of the area. Though ESDC staff expressed concern about the sufficiency of the Urbitran study as early as December 15, 2004, it made no move towards independently ascertaining conditions in the area until late March 2006. Indeed, ESDC only commissioned a new study on September 11, 2006. From its first meeting with Columbia in September 2003, ESDC received regular updates about Columbia's property acquisitions in the area. On August 1, 2005, ESDC solicited reports about the parcels that were not owned by Columbia. Throughout this time Columbia not only purchased or gained control over most of the properties in the area, but it also forced out tenant businesses, ultimately vacating, in 17 buildings, 50% or more of the tenants. The petitioners clearly demonstrate that Columbia also let water infiltration conditions in property it acquired go unaddressed, even when minor and economically rational repairs could arrest deterioration. Columbia left building code violations open, let tenants use premises in violation of local codes and ordinances by parking cars on sidewalks and obstructing fire exits, and maintaining garbage and debris in certain buildings over a period of years.

Thus, ESDC delayed making any inquiry into the conditions in Manhattanville until long after Columbia gained control over the very properties that would form the basis for a subsequent blight study. This conduct continued when ESDC authorized AKRF to use a

methodology biased in Columbia's favor. Specifically, AKRF was to "highlight" such blight conditions as it found, and it was to prepare individual building reports "focusing on characteristics that demonstrate blight conditions."

This search for distinct "blight conditions" led to the preposterous summary of building and sidewalk defects compiled by AKRF, which was then accepted as a valid methodology and amplified by Earth Tech. Even a cursory examination of the study reveals the idiocy of considering things like unpainted block walls or loose awning supports as evidence of a blighted neighborhood. Virtually every neighborhood in the five boroughs will yield similar instances of disrepair that can be captured in close-up technicolor.

ESDC originally specified that AKRF should study trends in real estate values and rental demand, and though its counsel requested that AKRF evaluate building conditions at the time Columbia acquired them, AKRF's final report included none of this evidence or any analysis derived therefrom. Even when ESDC abandoned AKRF, it nonetheless requested that its subsequent consultant, Earth Tech, "replicate" the AKRF study using the same flawed methodology.

The "no blight" study proffered by the petitioners sets forth all of the factors that AKRF, Earth Tech and ESDC should have considered, but did not, to arrive at any conclusion that Manhattanville was, or was not, blighted. The study contains an analysis of real estate

values, rental demand, rezoning applications and multiple prior proposals for the development of Manhattanville's waterfront and new commercial ventures; all omitted from ESDC's studies. ESDC failed to demonstrate any significant health or safety issues other than minor code violations that exist throughout the city, but more particularly in the buildings controlled by Columbia.

THE FOLLY OF UNDERUTILIZATION

The most egregious conclusion offered in support of the finding of blight is that of underutilization. AKRF and Earth Tech allege the existence of blight from, *inter alia*, the degree of utilization, or percentage of maximum permitted floor area ratio ("FAR") to which lots are built. The theoretical justification for using the degree of utilization of development rights as an indicator of blight is the inference that it reflects owners' inability to make profitable use of full development rights due to lack of demand. Lack of demand can only be determined in relation to the FAR when combined with the zoning for the area in question. Manhattanville, for the relevant period, was zoned to allow maximum FAR of two, leaving owners essentially with a choice between a one or two-story structure. No rationale was presented by the respondents for the wholly arbitrary standard of counting any lot built to 60% or less of maximum FAR as constituting a blighted condition. To the contrary, the New York City Department of City Planning uses a 50% standard to identify "underbuilt" lots. The petitioners accurately contend that while in a

mid-rise residential area, or a high-rise business district, a 60% figure might have some meaning as an indicator of demand, in an area zoned for a maximum of two stories, it effectively requires owners to build to the maximum allowable FAR. The M-1, M-2, and M-3 zoning of the Manhattanville industrial area was specifically intended, however, for uses in which a single story structure may be preferable. In our view, a 50% use of a permissible FAR of two does not, a fortiori, reflect a lack of demand. Moreover, for uses requiring loading docks, or storage of trucks or heavy equipment, or gas stations, for example, full lot coverage is not desirable. In an area zoned for such uses, utilization of 40% of FAR would be perfectly appropriate before any inference of insufficient demand can reasonably be made. The difference between AKRF's 60% standard and the petitioners' "no blight" study's 40% standard is the difference between 39% of the area, and 20% of the area being counted as "underutilized."

The time has come to categorically reject eminent domain takings solely based on underutilization. This concept put forward by the respondent transforms the purpose of blight removal from the elimination of harmful social and economic conditions in a specific area to a policy affirmatively requiring the ultimate commercial development of all property regardless of the character of the community subject to such urban renewal. *See Gallenthin Realty Dev. Inc. v. Borough of Paulsboro, 191 N.J. 344, 365, 924 A.2d 447, 460 (2007)* ("Under that approach, any property that is operated in a less than optimal manner is arguably blighted.' If

such an all-encompassing definition of "blight" were adopted, most property in the State would be eligible for redevelopment"); *In re Condemnation by Redevelopment Authority of Lawrence County, 962 A.2d 1257, 1265 (Pa. 2008), appeal denied, 601 Pa. 705, 978 A.2d 1008 (Pa. 2009)* (holding use to less than full potential does not constitute "economically undesirable" land use); *Sweetwater Valley Civic Assoc. v. City of National City, 18 Cal.3d 270, 133 Cal. Rptr. 859, 555 P.2d 1099 (1976)*; *Southwestern Illinois Dev. Auth. v. National City Envtl., 304 Ill.App.3d 542, 556, 710 N.E.2d 896, 906, 238 Ill. Dec. 99 (1999), aff'd, 199 Ill2d 225, 768 N.E.2d 1, 263 Ill. Dec. 241 (2002), cert. denied, 537 U.S. 880, 123 S. Ct. 88, 154 L. Ed. 2d 135 (2002)* ("If a government agency can decide property ownership solely upon its view of who would put that property to more productive or attractive use, the inalienable right to own and enjoy property to the exclusion of others will pass to a privileged few who constitute society's elite").

In New York, wherever underutilization has been a significant factor in a blight finding, courts have upheld the finding only in connection with other factors such as zoning defects rendering the property unusable or insufficiently sized or configured lots. *Matter of Haberman v. City of Long Beach, 307 A.D.2d 313, 762 N.Y.S.2d 425 (2d Dept. 2003), appeal dismissed, 1 NY3d 535, 775 N.Y.S.2d 232, 807 N.E.2d 282 (2003), cert. dismissed, 543 U.S. 1086, 125 S.Ct. 1239, 160 L.Ed.2d 896 (2005)*; *see Matter of Horoshko, 90 A.D.2d 850, 456 N.Y.S.2d 99 (2d Dept. 1982).*

In this case, the record overwhelmingly establishes that the true beneficiary of the scheme to redevelop Manhattanville is not the community that is supposedly blighted, but rather Columbia University, a private elite education institution. These remarkably astonishing conflicts with *Kelo* on virtually every level cannot be ignored, and render the taking in this case unconstitutional.

THERE IS NO CIVIC PURPOSE TO THIS USE OF EMINENT DOMAIN

The use of eminent domain should also be rejected on the grounds that Columbia's expansion is not a "civic project." *See* Uncons Laws § 6253(6)(d) (UDCA 3(6)(d)). ESDC states that the project will be used by Columbia for "education related uses," and thus the project serves a civic purpose. The petitioners correctly contend that within the definition of Uncons. Laws § 6253(6)(d) (UDCA 3(6)(d)), a private university does not constitute facilities for a "civic project." The statutory definition does refer to educational uses, but the final clause "or other civic purposes," clearly restricts the educational purposes qualifying for a civic project to only such educational purposes as constitute a "civic purpose."

There is little precedent on precisely this question, and what there is to guide us augurs powerfully against the respondent. In *Matter of Fisher (287 A.D.2d 262, 263, 730 N.Y.S.2d 516, 517 (1st Dept. 2001))*, this Court affirmed the condemning agency's findings that the condemnation of a building for the construction of new

New York Stock Exchange facilities would "result in substantial public benefits, among them increased tax revenues, economic development and job opportunities as well as preservation and enhancement of New York's prestigious position as a worldwide financial center." Here, Columbia is virtually the sole beneficiary of the Project. This alone is reason to invalidate the condemnation especially where, as here, the public benefit is incrementally incidental to the private benefits of the Project.

Although, as the petitioners note, there does not appear to be any New York case involving the condemnation of property for the purpose of expanding a private university, a California court held that a private university could acquire private land under its power of eminent domain for the purpose of landscaping and "beautify[ing]" the grounds surrounding a newly constructed university library. *See University of S. California v. Robbins, 1 Cal. App. 2d 523, 525, 37 P.2d 163, 164 (1934), cert. denied, 295 U.S. 738, 55 S. Ct. 650, 79 L. Ed. 1685 (1935).* The California court reasoned that "[t]he higher education of youth in its largest implications is recognized as a most important public use, vitally essential to our governmental health and purposes." *Robbins, 1 Cal. App. 2d at 530, 37 P.2d at 166.* However, this case offers little support for the respondent's position. In *Robbins*, the grant of eminent domain power to a tax-exempt educational institution was a creature of state law. No such legislative grant is present in the instant case. Furthermore, neither ESD nor ESDC based the use of eminent domain on Columbia's tax exempt status.

Appendix B

At least one court in New York has acknowledged, in dicta, that private institutions of higher learning serve important public purposes (*see Matter of Board of Educ., Union Free School Dist. No.2 v. Pace Coll., 27 A.D.2d 87, 91, 276 N.Y.S.2d 162, 166 (2d Dept. 1966)*), but this case reaches a conclusion directly contrary to the respondent's argument. In *Pace*, a local school board sought to acquire, by condemnation, land that Pace College purchased for the purpose of expanding its facilities (*see 27 A.D.2d at 88, 276 N.Y.S.2d at 163*). The Second Department held that Pace, a private college, could not resist appropriation of the land by invoking the defense that such land was being used for public purposes, since such a defense "is available only to a property owner who has been granted a power to condemn equivalent to that of the petitioning condemnor" and "Pace has been granted no such power" (*27 A.D.2d at 89, 276 N.Y.S.2d at 164*). While noting that Pace College "performs an admittedly useful service to the community and one in which the public has such vital interest that the State undertakes to regulate and control closely those institutions which engage therein" (*27 A.D.2d at 91, 276 N.Y.S.2d at 166*), the Second Department refused to consider whether Pace's character as an education institution would immunize it from the use of eminent domain by a local school board under the defense of prior public use. The Court explicitly rejected Pace's contention that its tax exempt status conferred such immunity:

> "Nor do we find it persuasive that the State, in order to encourage and assist the

> development of private educational institutions such as Pace College, has conferred upon them an exemption from the operation of certain tax laws. The fallacy of the argument urged upon us that an educational corporation receives such an exemption upon the principle of nontaxation of public places and as a quid pro quo' for the institution's performance of a public function has been demonstrated elsewhere." *Pace Coll., 27 A.D.2d at 91, 276 N.Y.S.2d at 166* (internal citations omitted).

Were we to grant civic purpose status to a private university for purposes of eminent domain, we are doing that which the Legislature has explicitly failed to do: as in California and Connecticut, that decision is solely the province of the state legislature.

UDCA IS UNCONSTITUTIONAL AS APPLIED IN THIS CASE

The petitioners assert, *inter alia*, that UDCA is unconstitutional as applied by the ESDC because the agency has failed to adopt, retain or promulgate any regulation or written standard for the finding of blight. The petitioners argue that the statute fails to give owners notice of what constitutes a blighted area and thus penalizes them for investing in land that may be taken away. In addition, the petitioners assert that the statute permits and encourages the ESDC to apply the law in an arbitrary and discriminatory fashion to favor

developers like Columbia. In support, the petitioners note that AKRF, the consultant for this Project, as well as the Atlantic Yards project, used different standards for determining blight. For example, the petitioners noted that in the Atlantic Yards study, AKRF considered buildings that are at least 50% vacant to exhibit blight, whereas in this Project AKRF considered a vacancy rate of 25% or more to be substandard. We agree with the petitioners' contentions and find that the statute is unconstitutional as applied.

"[C]ivil as well as penal statutes can be tested for vagueness under the *due process clause*." *Montgomery v. Daniels, 38 N.Y.2d 41, 58, 378 N.Y.S.2d 1, 15, 340 N.E.2d 444, 454 (1975)*; *see U.S. Const., 14th amend.*; *N.Y. Const., art. I, § 6*. Due process requires that a statute be sufficiently definite "so that individuals of ordinary intelligence are not forced to guess at the meaning of statutory terms." *Foss v. City of Rochester, 65 N.Y.2d 247, 253, 491 N.Y.S.2d 128, 131, 480 N.E.2d 717, 719-720 (1985)*; *see People v. Stuart, 100 N.Y.2d 412, 420, 765 N.Y.S.2d 1, 7, 797 N.E.2d 28, 34 (2003)*.

While the words "substandard or insanitary area" are not unconstitutionally vague, this does not necessarily end the inquiry. While these are abstract words, they have been interpreted and applied in the past without constitutional difficulty. *See e.g. Matter of Develop Don't Destroy (Brooklyn) v. Urban Dev. Corp., 59 AD3d 312, 874 N.Y.S.2d 414 (1st Dept 2009)*. Indeed, in *Berman v Parker (348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954))*, the Supreme Court held that a District of

Appendix B

Columbia Redevelopment Act allowing for the elimination of "substandard housing and blighted areas" was "sufficiently definite" even though the term "blighted areas" was not defined and the term "substandard housing" was defined broadly to include "lack of sanitary facilities, ventilation, or light [...] dilapidation, overcrowding, faulty interior arrangement, or any combination of these factors." *348 U.S. at 28 n.1, 75 S.Ct. at 100, 99 L.Ed at 39* The Court found that "the standards prescribed were adequate [...] to eliminate not only slums [...] but also the blighted areas that tend to produce slums." *Id. at 35, 75 S.Ct. at 104, 99 L.Ed. at 39.*

> "The public evils, social and economic of [unwholesome] conditions [in the slums], are unquestioned and unquestionable. Slum areas are the breeding places of disease which take toll not only from denizens, but, by spread, from the inhabitants of the entire city and State. Juvenile delinquency, crime and immorality are there born, find protection and flourish. Enormous economic loss results directly from the necessary expenditure of public funds to maintain health and hospital services for afflicted slum dwellers and to war against crime and immorality [...] Time and again [...] the use by the Legislature of the power of taxation and of the police power in dealing with the evils of the slums, has been upheld by the courts. Now, in continuation of a battle, which if not entirely lost, is far from won, the Legislature has resorted to the last

> of the trinity of sovereign powers by giving to a city agency the power of eminent domain." *Matter of New York City Hous. Auth. v. Muller, 270 N.Y. 333, 339, 1 N.E.2d 153, 154 (1936).*

Long after the U.S. Supreme Court decided *Berman*, the Ohio Supreme Court was faced with a statute virtually identical to that employed in the instant case, in *City of Norwood v. Horney (110 Ohio St. 3d 353, 2006 Ohio 3799, 853 N.E.2d 1115 (2006))*. The *Norwood* Court noted that "[i]nherent in many decisions affirming pronouncements that economic development alone is sufficient to satisfy the public-use clause is an artificial judicial deference to the state's determination that there was sufficient public use." *110 Ohio St. 3d at 371, 853 N.E.2d at 1136.* Nevertheless, the Court invalidated the Norwood Code:

> "Rather than affording fair notice to the property owner, the Norwood Code merely recites a host of subjective factors that invite ad hoc and selective enforcement — a danger made more real by the malleable nature of the public-benefit requirement. We must be vigilant in ensuring that so great a power as eminent domain, which historically has been used in areas where the most marginalized groups live, is not abused." *Norwood, 110 Ohio St. 3d at 382, 853 N.E.2d at 1145.*

The UDCA suffers the same vagueness as the *Norwood* Code. The application of the UDCA by the

various agencies in this case has resulted in "ad hoc and selective enforcement" as evidenced by the greatly divergent criteria used to define blight. The differences between the blight studies in *Develop Don't Destroy, (Brooklyn)* for Atlantic Yards and in the instant case, both performed by the same consultant, highlight the unconstitutional application of the UDCA. One is compelled to guess what subjective factors will be employed in each claim of blight.

THE UNCONSTITUTIONAL CLOSURE OF THE ADMINISTRATIVE RECORD

The petitioners correctly contend that when the respondent intentionally limited the administrative record by arbitrarily closing it, while simultaneously withholding documents that the petitioners are legally entitled to receive, it deprived the petitioners of a reasonable opportunity to be heard. Furthermore, we agree the petitioners were prevented from creating a full record for review by this Court, in violation of *EDPL 203* and the petitioners' due process rights under the *Fourteenth Amendment of the United States Constitution* and *article 1, § 6 of the New York Constitution.*

The EDPL requires that at the administrative hearing, prior to the close of the record, the condemnee shall be given a "reasonable opportunity" to be heard and an opportunity to "submit other documents concerning the proposed public project" into the record. *EDPL 203.* A full administrative record is critical for

the obvious reason that judicial review of a condemnation decision under the EDPL is limited to issues, facts, and objections entered into the record at the condemnation hearing. *EDPL 202(C)(2); 207(A),(B).* The Second Circuit, in *Brody v. Village of Port Chester (434 F.3d 121, 134 (2005))*, emphasized that point: "[T]he procedures that are available are indeed limited in scope. The Appellate Division, which has exclusive jurisdiction over the review, will only consider the issues resolved by the legislative determination. Furthermore, the review is limited to the record before the condemnor at the time of the determination."

Additionally, any challenge to ESDC's determination is limited to that contained in the record on which the agency based its determination. The petitioners clearly had no ability under the EDPL to call witnesses to supplement the record, introduce further evidence, cross-examine the respondents' witnesses who submitted expert affidavits after the record was closed or submit argument in opposition to those untimely expert affidavits. More importantly, the petitioners filed numerous FOIL requests seeking information about the Columbia plan and the process utilized by ESDC. The respondents vigorously opposed some of those FOIL requests which ultimately led to several Supreme Court orders requiring disclosure and our decision in *Tuck-It-Away I*.

It is beyond dispute that, as the cutoff date to enter documents into the record approached, the respondent and other agencies engaged in a last-ditch effort to

thwart the petitioners' attempt to obtain documents, including those which were ordered by the courts of this State to be released and turned over to the petitioners. The respondent moved for reargument, or in the alternative, for leave to appeal from this Court's ruling in *Tuck-It-Away* and *Matter of West Harlem Bus. Group v. Empire State Dev. Corp.*, which motion this Court denied in its entirety on January 27, 2009. 2009 NY Slip Op 61948[U] (1st Dept. 2009), *lv. granted, 12 N.Y.3d 708, 906 N.E.2d 1089, 879 N.Y.S.2d 55 (2009)*. Nonetheless, in making the motion, the respondent invoked an automatic stay of the decision, under *CPLR 5519*. Similarly, the New York City Department of City Planning moved to reargue Supreme Court's decision ordering disclosure of Columbia-related documents based on the holding of *Tuck-It-Away I*. The respondent and other cooperating agencies, therefore, by virtue of *section 5519*, were provided the opportunity to withhold documents that this Court and Supreme Court ordered released, while at the same time closing the record to prevent these documents from being submitted into the record. The appeals and reargument motions became the sine qua non of the various agencies' non compliance with FOIL. Similarly, the petitioners' efforts to extend the deadline for closing the record were vigorously rebuffed by ESDC. ESDC's actions deprived the petitioners of a reasonable opportunity to be heard under *EDPL 203* and violated their due process rights under the *Fourteenth Amendment of the United State Constitution* and *article 1, § 6 of the New York Constitution.*

Appendix B

Many commentators have noted that "[f]ew policies have done more to destroy community and opportunity for minorities than eminent domain. Some three to four million Americans, most of them ethnic minorities, have been forcibly displaced from their homes as a result of urban renewal takings since World War II." Belito and Somin, *Battle Over Eminent Domain is Another Civil Rights Issue*, Kansas City Star, Apr. 27, 2008. The instant case is clear evidence of that reality. The unbridled use of eminent domain not only disproportionately affects minority communities, but threatens basic principles of property as contained in the *Fifth Amendment*. In her dissent in *Kelo*, Justice O'Connor warned that:

> "Today the Court abandons this long-held, basic limitation on government power. Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public— in the process. To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings for public use' is to wash out any distinction between private and public use of property—and thereby effectively to delete the words for public use' from the *Takings Clause of the Fifth Amendment*." *Kelo, supra, 545 U.S. at 494, 125 S.Ct. at 2671, 162 L.Ed.2d at 461.*

Justice O'Connor's admonition is equally true in this case in that:

> "Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result. [T]hat alone is a *just* government,' wrote James Madison, which *impartially* secures to every man, whatever is his *own*.' For the National Gazette, Property (Mar. 27, 1792) reprinted in 14 Papers of James Madison 266 (R. Rutland et al. eds. 1983). *545 U.S. at 505, 125 S.Ct. at 2677, 162 L.Ed.2d at 468* (emphasis supplied).

It is not necessary to reach the position that *Kelo* was wrongly decided to invalidate the proposed takings in this case. The sharp differences between this case and the careful plan drafted by New London and described by the *Kelo* plurality could not be more compelling.

Accordingly, the petitions brought in this Court pursuant to *Eminent Domain Procedure Law § 207*

challenging the determination of respondent New York State Urban Development Corporation d/b/a Empire State Development Corporation, dated December 18, 2008, which approved the acquisition of certain real property for the project commonly referred to as the Columbia University Educational Mixed Use Development Land Use Improvement and Civic Project, should be granted, and the determination annulled.

All concur except Richter, J. who concurs in a separate Opinion and Tom, J.P. and Renwick, J. who dissent in an Opinion by Tom, J.P.

CONCUR BY: Rosalyn H. Richter

CONCUR

RICHTER, J. (concurring)

Under the circumstances presented here, ESDC's premature closing of the agency record, while it continued to withhold relevant documents this Court had ordered disclosed under the Freedom of Information Law (FOIL), violated both the EDPL and procedural due process under the state and federal constitutions. I write separately to explain my reasoning.

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the *Due Process Clause of the Fifth* or *Fourteenth*

Amendment" (*Mathews v Eldridge, 424 US 319, 332, 96 S. Ct. 893, 47 L. Ed. 2d 18 [1976]*). The essence of procedural due process is notice and an opportunity to be heard (*id. at 333*; *Matter of Quinton A., 49 NY2d 328, 334, 402 N.E.2d 126, 425 N.Y.S.2d 788* n [1980]). In the context of eminent domain, "[t]he constitutional requirement with respect to notice . . . concerns the opportunity to be heard on the issues of compensation and public use" (*Fifth Ave. Coach Lines v City of New York, 11 NY2d 342, 348, 183 N.E.2d 684, 229 N.Y.S.2d 400 [1962]*; *accord County of Monroe v Morgan, 83 AD2d 777, 778, 443 N.Y.S.2d 467 [1981]*). The opportunity to be heard in condemnation proceedings is also mandated by the EDPL which requires a public hearing (*EDPL 201*), where the attendees must be given a "reasonable opportunity" to present oral or written statements and to "submit other documents concerning the proposed public project" (*EDPL 203*). In determining whether a procedural due process violation has occurred, courts must balance the property owner's interests against the government's interests (*Matter of Zaccaro v Cahill, 100 NY2d 884, 890, 800 N.E.2d 1096, 768 N.Y.S.2d 730 [2003]*). In doing so, the following factors must be weighed: (i) the private interest that will be affected by the official action; (ii) the risk of erroneous deprivation of such interest by the procedures employed, and the probable value, if any, of additional procedural safeguards; and (iii) the State's interest, including the function involved and the fiscal and administrative burdens that such additional procedural requirements would entail (*Pringle v Wolfe, 88 NY2d 426, 431, 668 N.E.2d 1376, 646 N.Y.S.2d 82 [1996], cert denied 519 U.S. 1009, 117 S. Ct. 513, 136 L. Ed. 2d 402 [1996]*).

The balancing of these factors leads me to conclude that, under the unique circumstances presented, Tuck-It-Away's procedural due process and statutory rights were violated by ESDC's refusal to keep the record open until the conclusion of the FOIL litigation initiated by Tuck-It-Away[3]. As to the first due process factor, the private interest affected here is substantial. Tuck-It-Away stands to lose the four properties it owns in the Manhattanville area where it conducts its self-storage business.[4]

The second factor — the risk of erroneous deprivation of Tuck-It-Away's properties by the closing of the agency record and the probable value of holding the record open until all of the withheld FOIL documents were produced — requires review of Tuck-It-Away's claims. A condemnation can be set aside if it was made in bad faith (*Matter of 49 WB, LLC v Village of Haverstraw, 44 AD3d 226, 238-39, 839 N.Y.S.2d 127 [2007]*; *Greenwich Assoc. v Metropolitan Transp. Auth., 152 AD2d 216, 221, 548 N.Y.S.2d 190 [1989], appeal dismissed 75 N.Y.2d 865, 552 N.E.2d 178, 552 N.Y.S.2d 930 [1990]*) or under the pretext of a public purpose when the actual purpose was to bestow a private benefit (*Kelo v City of New London, 545 US 469, 478, 125 S. Ct.*

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3. Tuck-It-Away shall refer, individually and collectively, to each of the four named petitioners in the first captioned matter.

4. Although the Kaur petitioners do not raise a due process claim, the devastating consequence of the loss of their property equals that of Tuck-It-Away.

2655, 162 L. Ed. 2d 439 [2005]; *Matter of Goldstein v New York State Urban Dev. Corp., 64 AD3d 168, 183, 879 N.Y.S.2d 524 [2009])*. Here, Tuck-It-Away points to evidence suggesting that ESDC's findings of blight and civic purpose were made in bad faith and were pretextual, and that the real reason for the condemnation was not to further any public purpose but rather to benefit Columbia, a private developer.

At the heart of Tuck-It-Away's bad faith/pretext argument lies what this Court has described as the "tangled relationships of Columbia, ESDC and their shared consultant, AKRF" (*Matter of Tuck-It-Away Assoc., L.P. v Empire State Dev. Corp., 54 AD3d 154, 166, 861 N.Y.S.2d 51 [2008], lv granted 12 N.Y.3d 708, 906 N.E.2d 1089, 879 N.Y.S.2d 55 [2009])*. In that decision, we found that AKRF's simultaneous representation of both ESDC and Columbia created "an inseparable conflict" for purposes of FOIL (*Tuck-It-Away, 54 AD3d at 164*). In light of the fact that AKRF was serving two masters, we concluded that there was reason to doubt AKRF's independence and objectivity (*54 AD3d at 165*).

Although ESDC subsequently hired another consultant — Earth Tech — to prepare a neighborhood conditions study, the record raises questions as to whether, in doing so, ESDC sought and obtained a truly independent analysis. The contract retaining Earth Tech does not require it to do a de novo study, but rather it was retained to examine the information in the AKRF study. If AKRF, due to its preexisting relationship with

Columbia, used a flawed or biased methodology to evaluate neighborhood conditions in order to reach the result Columbia wanted, any such flaws or biases would necessarily have been carried over to the Earth Tech study. Furthermore, ESDC's Determination and Findings explicitly acknowledge that it "relied upon the facts and analyses set forth in the [AKRF study]" in exercising its condemnation power.

There are serious legal questions about whether the proposed development constitutes a "civic project" under the Urban Development Corporation Act (UDCA) (McKinney's Uncons Laws of NY § 6251, *et seq.* [L 1968, ch 174, § 1, as amended]). In the absence of a civic purpose, the only possible basis for ESDC's exercise of eminent domain would rest on a finding of blight. Thus, in light of the significant questions raised concerning ESDC's alleged bad faith and improper motives, I find that ESDC should not have closed the agency record prior to the conclusion of the FOIL litigation.[5] The final factor — the State's interest and the burdens of keeping the record open — weighs in favor of Tuck-It-Away. The wrongfulness of ESDC's actions becomes apparent by examining the history of Tuck-It-Away's efforts to obtain documents from the agency. In 2005 and 2006, Tuck-It-Away and West Harlem Business Group (WHBG), an association of which Tuck-It-Away is a member, made a

5. Neither the briefs nor oral argument established the precise number or nature of the withheld documents, though there are letters in the voluminous record on appeal which suggest that ESDC may have voluntarily produced some of the documents we ordered disclosed.

number of requests to ESDC under FOIL seeking records relating to the project and planning activities. Although ESDC produced some records, others were withheld. Tuck-It-Away and WHBG brought CPLR article 78 petitions challenging ESDC's determination and Supreme Court ordered the agency to turn over certain records, which we affirmed.

The public hearing on the condemnation was held on September 2 and 4, 2008, just six weeks after our decision, and the record was scheduled to be closed on October 10. Clearly, had ESDC complied with this Court's order and turned over all the documents, Tuck-It-Away could have submitted that information for inclusion in the record[6]. Instead, by seeking reargument of our decision and leave to appeal to the Court of Appeals, ESDC gained the benefit of the automatic statutory stay of our order (*CPLR 5519*) thereby keeping the withheld documents out of the agency record. Although, as the dissent notes, Tuck-It-Away did not seek to vacate the automatic stay, this does not alter the legal analysis as to whether ESDC's subsequent closing of the record violated due process.

In addition, ESDC denied Tuck-It-Away's request to keep the record open until the resolution of the FOIL litigation and vigorously opposed Tuck-It-Away's attempt in Supreme Court to enjoin the agency from

6. No argument can be made that Tuck-It-Away did not act diligently in trying to obtain the records because the relevant FOIL request was made a full two years before the public hearing was held.

closing the record. Although a temporary restraining order was obtained, on October 30, 2008, Supreme Court vacated that order and dismissed Tuck-It-Away's challenge. That same day, ESDC closed the agency record, thus thwarting Tuck-It-Away's opportunity to submit the withheld documents.

ESDC has failed to convincingly explain why it did not adjourn the condemnation hearing until after the FOIL litigation was resolved. Indeed, *EDPL 203* explicitly provides that "[f]urther adjourned hearings may be scheduled." Tellingly, ESDC does not argue that the relatively short delay in the hearing pending resolution of the FOIL litigation would have negatively impacted the project, which had been in planning as early as 2002 and whose construction is scheduled to take place in two phases over the course of 25 years. In *Matter of East Thirteenth St. Community Ass'n. v New York State Urban Dev. Corp. (84 N.Y.2d 287, 641 N.E.2d 1368, 617 N.Y.S.2d 706 [1994])*, the Court of Appeals noted that the drafters of the EDPL recognized that increased public participation could delay projects, but also believed that requirements of notice and a hearing could forestall the increasing amount of litigation (*84 NY2d at 294*).

ESDC maintains that the premature closing of the record is of no legal significance because Tuck-It-Away was provided with ample opportunity to be heard through testimony at the public hearing and submission of documents into the record. However, "[a] due process right to be heard requires an opportunity to be heard

at a meaningful time and in a meaningful manner'" (*Rao v Gunn, 73 NY2d 759, 763, 532 N.E.2d 1275, 536 N.Y.S.2d 47 [1988], quoting Armstrong v Manzo, 380 US 545, 552, 85 S. Ct. 1187, 14 L. Ed. 2d 62 [1965]*). In light of the withholding of critical documents which were ordered disclosed by this Court, the opportunity provided to Tuck-It-Away here was not meaningful within the spirit of due process.

ESDC unpersuasively argues that a ruling in Tuck-It-Away's favor on this particular issue would require future condemning authorities to litigate every disputed issue through to the Court of Appeals before exercising their power of eminent domain. Due process, however, is a flexible concept whose procedural protections must be tailored to the particular facts at hand (*Curiale v Ardra Ins. Co., 88 NY2d 268, 274, 667 N.E.2d 313, 644 N.Y.S.2d 663 [1996]*; *Matter of Weeks Mar. v City of New York, 291 AD2d 277, 278, 737 N.Y.S.2d 92 [2002]*). Thus, "not all situations calling for procedural safeguards call for the same kind of procedure" (*Morrissey v Brewer, 408 US 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 484 [1972]*). Merely because I find a due process violation here does not mean that in every case, all FOIL requests must be resolved before an agency can condemn property. Nor do I find, as Tuck-It-Away urges, that due process requires a full trial court review, including discovery, cross-examination and a jury trial. However, the confluence of factors here, including the evidence raising questions of bad faith and pretext, Tuck-It-Away's protracted effort to obtain the withheld documents and ESDC's denial of the request to keep the record open

while exercising their right to stay this Court's order requiring disclosure leads me to conclude that a due process violation has occurred in this case.

The finding of a due process violation here is not in conflict with *Brody v Village of Port Chester (434 F3d 121 [2005])*. In *Brody*, the Second Circuit held that the EDPL's procedures for reviewing condemnation findings do not violate the federal constitution (*434 F3d at 123*). The Second Circuit, however, neither addressed the state constitutional issues nor did it decide whether a due process violation could occur if the State's actions interfere with a property owner's right to obtain meaningful review in this Court.

ESDC'S reliance on *Matter of Waldo's, Inc. v Village of Johnson City (141 AD2d 194, 199, 534 N.Y.S.2d 723 [1988], affd 74 NY2d 718, 543 N.E.2d 74, 544 N.Y.S.2d 809 [1989])*, is misplaced. In *Waldo's*, the petitioner maintained that the public hearing was invalid in part because the respondent refused to provide full and complete information about the project's funding and denied it the opportunity to cross-examine witnesses at the hearing. The Court denied the due process claim and found that the petitioner did in fact receive an answer to its question on funding and that there was no right to an adversarial hearing. Here, in contrast, there is no dispute that at the time the record was closed, Tuck-It-Away had not received all the documents this Court ordered turned over.

*Lawrence v Baxter (2004 US Dist LEXIS 18022, *8-10, 2004 WL 1941347, *3 [WD NY 2004], affd 139 Fed*

Appx 365 [2d Cir 2005]), cited by ESDC as support for denying Tuck-It-Away's due process claim, has no applicability to this dispute. *Lawrence*, a *42 USC § 1983* case having nothing to do with eminent domain, merely held that for due process purposes, a plaintiff has no property interest in obtaining documents under FOIL. The court dismissed the plaintiff's due process claim because he failed to allege that he was deprived of a property interest protected by the United States Constitution. Here, however, the property interest asserted is not the documents themselves, but rather Tuck-It-Away's four buildings. Thus, *Lawrence* is irrelevant to the due process analysis here.

Because the condemnation proceeding was neither "in conformity with the federal and state constitutions" (*EDPL 207[C][1]*) nor "in accordance with procedures set forth in [the EDPL]" (*EDPL 207[C][3]*), ESDC's Determinations and Findings should be rejected. Since the determination must be annulled based on ESDC's premature closing of the record, it is not necessary for me to address the other statutory and constitutional issues presented by this case.

DISSENT BY: Peter Tom

DISSENT

TOM, J. (dissenting)

At issue on this appeal is the acquisition of approximately 17 acres in the Manhattanville area of

West Harlem by Columbia University for the development of its campus. In addition to up to 16 new buildings, a multi-level below-grade facility and the adaptive re-use of an existing building, the project would create approximately two acres of publicly accessible open space, a market along 12th Avenue and widened tree-lined sidewalks. The General Project Plan adopted by Empire State Development Corporation (ESDC), as modified, states that the project, inter alia, will maintain the City and State of New York as a leading center of higher education and academic research by providing state-of-the-art facilities and provide the community with employment opportunities and civic amenities.

Petitioners own property subject to condemnation located within the project site, which extends from West 125th Street to West 133rd Street and from Broadway and Old Broadway to 12th Avenue. They brought this proceeding to challenge ESDC's determination that the project qualifies not only as a land use improvement project but also, discretely, as a civic project pursuant to the New York State Urban Development Corporation Act (UDCA) (L 1968, ch 174, § 1, as amended) § 6253(6)(c) and (d) (McKinney's Uncons Laws of NY § 6253[6][c], [d]).

I do not accept petitioners' contention that the project neither qualifies as a civic project nor serves a public purpose and, thus, that ESDC exceeded its statutory authority in designating the project a civic project pursuant to Uncons Laws § 6260(d). Under the UDCA, such designation is conditioned upon findings

that "there exists in the area in which the project is to be located, a need for the educational, cultural, recreational, community, municipal, public service or other civic facility to be included in the project" (Uncons Laws § 6260[d][1]) and that "the project shall consist of a building or buildings or other facilities which are suitable for educational, cultural, recreational, community, municipal, public service or other civic purposes" (Uncons Laws § 6260[d][2]). A private institution of higher learning serves a public purpose (*see University of S. California v Robbins, 1 Cal App 2d 523, 37 P2d 163 [1934], cert denied 295 U.S. 738, 55 S. Ct. 650, 79 L. Ed. 1685 [1935]*). In any event, ESDC's finding that the project will serve a public purpose by providing, among other things, needed educational facilities in the area in which it is to be located is neither irrational nor baseless.

Property is subject to acquisition in connection with a land use improvement project upon ESDC's finding, inter alia, that "the area in which the project is to be located is a substandard or insanitary area, or is in danger of becoming a substandard or insanitary area" (Uncons Laws § 6260[c][1]). "Substandard or insanitary area," by definition, is "interchangeable with a slum, blighted, deteriorated or deteriorating area, or an area which has a blighting influence on the surrounding area" (Uncons Laws § 6253[12]). Various conditions constituting blight are set forth in the UDCA's statement of legislative findings and purposes (Uncons Laws § 6252). Contrary to petitioners' contention, the term "substandard or insanitary area" is not

unconstitutionally vague. Though abstract, these words have been interpreted and applied without constitutional difficulty (*see Berman v Parker, 348 US 26, 75 S. Ct. 98, 99 L. Ed. 27 [1954]*; *see also Yonkers Community Dev. Agency v Morris, 37 N.Y.2d 478, 483, 335 N.E.2d 327, 373 N.Y.S.2d 112 [1975], appeal dismissed 423 U.S. 1010, 96 S. Ct. 440, 46 L. Ed. 2d 381 [1975]*).

I further reject petitioners' argument that ESDC's finding of blight was insufficient as a matter of law and fact and that it was arrived at corruptly and in bad faith (*see Matter of Jackson v New York State Urban Dev. Corp., 67 NY2d 400, 425, 494 N.E.2d 429, 503 N.Y.S.2d 298 [1986]*; *Kaskel v Impellitteri, 306 NY 73, 79, 115 N.E.2d 659 [1953], cert denied 347 U.S. 934, 74 S. Ct. 629, 98 L. Ed. 1085 [1954]*). Two blight studies documented substandard and insanitary conditions by photographic evidence and other indicia. Petitioners present merely "a difference of opinion" with the conclusions to be drawn from this evidence, in which event the courts are bound to defer to the agency (*Matter of Develop Don't Destroy (Brooklyn) v Urban Dev. Corp., 59 AD3d 312, 324, 874 N.Y.S.2d 414 [2009]*). As the Court of Appeals recently stated:

> "It is quite possible to differ with ESDC's findings that the blocks in question are affected by numerous conditions indicative of blight, but any such difference would not, on this record, in which the bases for the agency findings have been extensively documented

> photographically and otherwise on a lot-by-lot basis, amount to more than another reasonable view of the matter; such a difference could not, consonant with what we have recognized to be the structural limitations upon our review of what is essentially a legislative prerogative, furnish a ground to afford petitioners relief" (*Goldstein v New York State Urban Dev. Corp., 13 NY3d 511, 526, 921 N.E.2d 164, 893 N.Y.S.2d 472, 2009 N.Y. LEXIS 4090, 2009 NY Slip Op 8677, 2009 WL 4030939, *9 [2009]*).

Likewise, petitioners have not made a "clear showing" of bad faith (*Matter of Faith Temple Church v Town of Brighton, 17 AD3d 1072, 1073, 794 N.Y.S.2d 249 [2005]*). While ESDC retained AKRF, Inc. to perform a blight study knowing that AKRF was performing consulting work for Columbia in relation to the project, any conflict of interest or bias was eliminated by ESDC's retention of Earth Tech, Inc., an independent consultant with no ties to Columbia, to review and audit the AKRF study. Nor is there clear evidence that ESDC and Columbia colluded to manipulate the blight findings. Although they worked together in the planning process, the UDCA requires that a land use improvement project "afford[] maximum opportunity for participation by private enterprise" (Uncons Laws § 6260[c][3]). That Columbia will benefit from the project as well as the public is not a legally sufficient reason to invalidate ESDC's determinations (*see Matter of Waldo's, Inc. v Village of Johnson City,*

74 NY2d 718, 721, 543 N.E.2d 74, 544 N.Y.S.2d 809 [1989], affg 141 AD2d 194, 534 N.Y.S.2d 723 [1988]).

Because petitioners were given notice of the public hearing and the opportunity to be heard and to submit documents, I reject petitioners' contention that they were denied due process or a reasonable opportunity to be heard under *EDPL 203* (*see Matter of Waldo's, Inc., 141 AD2d at 199*; *First Broadcasting Corp. v Syracuse, 78 AD2d 490, 495, 435 N.Y.S.2d 194 [1981], appeal dismissed 53 N.Y.2d 939 [1981])*. Nor were petitioners' due process rights violated when ESDC denied some of their FOIL requests and closed the record prior to the resolution of the FOIL litigation (*see generally Lawrence v Baxter, 2004 US Dist LEXIS 18022, *8-10, 2004 WL 1941347, *3 [WD NY 2004], affd 139 Fed Appx 365 [2d Cir 2005])*. Contrary to petitioners' assertion, the EDPL procedures for challenging the agency's determinations satisfy the requirements of due process (*see Brody v Village of Port Chester, 434 F3d 121, 132-133 [2d Cir 2005])*. As to the FOIL requests, I note that petitioners received over 8,000 pages of documents from ESDC.

With respect to the closing of the record, petitioners fail to explain why they failed to bring a motion to vacate the automatic stay (*CPLR 5519[a]*) imposed upon respondent's appeal from our order directing that additional documents be turned over by it *(54 AD3d 154, 861 N.Y.S.2d 51 [2008], lv granted sub nom. Matter of West Harlem Bus. Group v Empire State Dev. Corp., 12 NY3d 708, 906 N.E.2d 1089, 879 N.Y.S.2d 55 [2009])*. A

CPLR 5519(c) application would have afforded the Court with the opportunity to assess whether petitioners could demonstrate the likelihood of success on the merits of their position that the withheld documents fall outside the deliberative materials exemption applicable to disclosure under the Freedom of Information Law (*see Matter of Xerox Corp. v Town of Webster, 65 NY2d 131, 480 N.E.2d 74, 490 N.Y.S.2d 488 [1985]*) and that such documents were material to ESDC's determination and, thus, essential to affording petitioners procedural due process. A year has now elapsed since the record of the administrative proceeding was closed, and even at this late juncture, petitioners have not made any showing as to the materiality of documents directed to be produced under this Court's order; nor have petitioners set forth what the documents assertedly being withheld in contravention of our order might be expected to reveal. Furthermore, even if such materials are ultimately found by the Court of Appeals to be subject to disclosure under FOIL, there is simply no order concerning a stay of proceedings that is brought up for review (*CPLR 5501[a][1]*). Petitioners' intimation that the administrative determination should have been delayed while the FOIL litigation was completed is without factual or procedural foundation.

The record establishes that ESDC took the requisite hard look at the relevant areas of environmental concern, including the impact of the project's below-grade facility, particularly with respect to flooding issues (*see Matter of Jackson, 67 NY2d at 417*).

Accordingly, the determination of respondent New York State Urban Development Corporation should be confirmed. Petitions brought in this Court pursuant to *Eminent Domain Procedure Law § 207*, challenging the determination of respondent New York State Urban Development Corporation d/b/a Empire State Development Corporation, dated December 18, 2008, granted, and the determination annulled.

Opinion by Catterson, J. All concur except Richter, J. who concurs in a separate Opinion and Tom, J.P. and Renwick, J. who dissent in an Opinion by Tom, J.P.

Tom, J.P., Nardelli, Catterson, Renwick, Richter, JJ.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: DECEMBER 3, 2009

APPENDIX C — E-MAIL CORRESPONDENCE DATED MAY 12, 2006

Cassidy, Maria

From: Petillo, Joseph

Sent: Friday, May *12.2006* 1:14 PM

To: Cassidy, Marla

Cc: Laremont. Anita

Subject: RE; Columbia University - proposed campus expansion: blight study so/icitation

My first reaction is — Why do this? I'm uncomfortable with us shining a spotlight on the process used to manufacture support for condemnation. The ideal firm to prepare such a study will be the consultant who (probably simultaneously) will be preparing the DEIS for the proposed project, as a certain amount of the work will be the same. In this post-Kelo period, maybe we want to craft the support for our blight findings in a less public way --- such as more discretely wrapping this up with the work being performed by the EIS consultant. Also, by advertising this now, are we setting a new standard for doing land use improvement projects? Are we saying publicly that we won't get involved without first retaining a consultant to provide a "study" upon which we can base our Section 10 findings? That's not necessarily bad, but is that where we want to go?

Appendix C

——<OriginaI Message—·

From: Cassidy, Marla

Sent: Friday, May 12, 2006 12:53 PM

To: Laremont, Anita; Shatz, Rachel; Hulka, Ann; Chan, Joseph; 'ryan@clm.com'

Cc: Petillo, Joseph; Nasroodin, Nezam; Poole, Laverne

Subject: Columbia University - proposed campus expansion: blight study solicitation

Hello, all.

I am attaching a draft Request for Proposals for a consultant to perform a blight study of the proposed Columbia University expansion area. I would appreciate your review and comment on the attached. The "Required Services/Deliverables" section was taken from an outline provided to us by AKRF of the blight study being prepared in connection with the Atlantic Yards project.

Also, if you can suggest any firms to which this solicitation should be sent, please send me that information along with any contact name and number that you might have.

Appendix C

Joe Petillo, I know you are not working on the Columbia University project, but if you could take a look at this draft I would appreciate it.

Laverne, please provide the proper AA language and forms.

Nezam, please review the insurance section as well as for compliance with the various procurement requirements.

Thank you all.

<<File: RFP for blight study.doc >>

Maria Cassidy

Deputy General *Counsel*

Empire State Development Corporation

ph: 212-803-3790

fax: 212-803-3990

OPPOSITION BRIEF

No. 10-402

Supreme Court, U.S.
FILED
NOV 12 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

TUCK-IT-AWAY, INC., et al.,

Petitioners,

v.

NEW YORK STATE URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals properly concluded, after a careful review of the record, (1) that the proposed exercise of eminent domain would serve a "public use" by removing longstanding blight in a deteriorated neighborhood and promoting higher education through the construction of academic and research facilities at a non-profit university and (2) that Petitioners' allegations of "bad faith" and "pretext" were "unsubstantiated"?

2. Whether the Court of Appeals properly concluded that Petitioners were afforded due process where they (1) had "unfettered access" to all of the documents that formed the basis for the decision to use eminent domain, (2) appeared at the public hearing and submitted 10,000 pages of materials into the administrative record before the final decision to acquire their properties was made, and (3) failed to demonstrate the materiality of the additional documents obtained after the administrative record was closed?

TABLE OF CONTENTS

Page

Questions Presented i

Table Of Authorities iv

Introduction 1

Statement 3

A. The Proposed Project 3

B. ESDC And The Eminent Domain Process 6

C. The Public Process For The Project Conducted By The City Of New York And ESDC 8

D. The Freedom Of Information Law Litigation 12

E. Petitioners' Claims And The Decisions Below 13

Reasons For Denying The Petition 18

POINT I

The "Public Use" Issue Presented In The Petition Does Not Warrant This Court's Review 18

A. The Court Of Appeals' Decision Raises No Important Issue Warranting Review 18

B. The Court Of Appeals' Decision Is Consistent With *Kelo* 22

C. There Is No Conflict Among The Lower Courts That Warrants This Court's Review..... 26

POINT II

The Procedural Due Process Issue Presented In The Petition Does Not Warrant This Court's Review..... 32

A. Petitioners Do Not Present Any Important Legal Issue Warranting This Court's Review..... 32

B. The Public Processes Provided By The Eminent Domain Procedure Law Comply With Due Process 34

Conclusion 37

TABLE OF AUTHORITIES

Page

CASES

Adams v. United States, 673 F. Supp. 1249 (S.D.N.Y. 1987) 36

Berman v. Parker, 348 U.S. 26 (1954) 16, 16 n.31, 22

Brody v. Vill. of Port Chester, 434 F.3d 121 (2d Cir. 2005) 8, 32

Cornell Univ. v. Bagnardi, 68 N.Y.2d 583 (1986) ..... 17 n. 33

County of Hawai'i v. C & J Coupe, 198 P.3d 615 (HI 2008) 30

Edwards v. Aguillard, 482 U.S. 578 (1987) 22

Franco v. Nat'l Capital Revitalization Corp., 930 A.2d 160 (D.C. 2007) 28, 29

In re Goldstein v. New York State Urban Dev. Corp., 13 N.Y.3d 511 (2010) 23

Goldstein v. Pataki, 488 F. Supp.2d 254 (E.D.N.Y. 2007), *aff'd*, 516 F.3d 50 (2d Cir.), *cert. den.*, 128 S. Ct. 2964 (2008) 8, 32

Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984) 23

Kelo v. City of New London, 545 U.S. 469 (2005) ..... *passim*

Mathews v. Eldridge, 424 U.S. 319 (1976).. 33, 34, 36

Middletown Twp. v. Lands of Stone, 939 A.2d 331 (PA 2007) 31

Mullane v. Cent. Hanover Trust Co., 339 U.S. 306 (1950) 34

NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170 (1981) ... 19 n. 39

Rhode Island Econ. Dev. Corp. v. The Parking Co., L.P., 892 A.2d 87 (R.I. 2006) 30-31

Tuck-It-Away Assocs., L.P. v. ESDC, 54 A.D.3d 154 (1st Dep't 2008) 12

United States v. Gettysburg Elec. Ry., 160 U.S. 668 (1896) 23

West Harlem Bus. Group v. ESDC, 13 N.Y.3d 882 (2009) ..... 13 n. 22

STATUTES

N.Y. Eminent Domain Procedure Law §201 7

N.Y. Eminent Domain Procedure Law §202 7

N.Y. Eminent Domain Procedure Law §203 7

N.Y. Eminent Domain Procedure Law §204 7

N.Y. Eminent Domain Procedure Law §207 7

N.Y. Eminent Domain Procedure Law §208 7

N.Y. Unconsol. Laws §6253 ..... 6, 7

N.Y. Unconsol. Laws §6254 6

N.Y. Unconsol. Laws §6255 6

N.Y. Unconsol. Laws §6260 6

N.Y. Unconsol. Laws §6263 6

INTRODUCTION

Petitioners seek review of a unanimous decision of the New York Court of Appeals that applied well-established principles in upholding the decision of New York State Urban Development Corporation d/b/a Empire State Development Corporation ("ESDC") to exercise its power of eminent domain. ESDC authorized the use of eminent domain to facilitate the Columbia Educational Mixed Use Land Use Improvement and Civic Project (the "Project"). The Project will replace dilapidated and substandard buildings in the Project Site with new educational and academic research facilities and publicly accessible open space to be owned and operated by Columbia University ("Columbia"), a non-profit educational institution.

The Court of Appeals held that the Project will serve two independent public purposes. First, the Project will eliminate longstanding blighted conditions in the area, which the Court of Appeals found were "extensively documented photographically and otherwise on a lot-by-lot basis." Second, the Project will promote education, academic research and the expansion of knowledge, which the Court described as "pivotal government interests." The Court further concluded that the Project will provide numerous other public benefits to the community, including two acres of publicly-accessible open space, upgrades in transit infrastructure, thousands of jobs, and a financial commitment to a local park.

Petitioners argue that ESDC's determination that the Project will eradicate blight and promote education was pretextual, and that ESDC acted in bad faith in approving the Project. But as the Court of Appeals concluded, the record refutes that contention. Petitioners' submission to the contrary is no more than a challenge to that factbound determination and thus does not warrant review by this Court.

The Court of Appeals also rejected Petitioners' claim that they were denied due process when ESDC closed its administrative record and approved the Project while a few of Petitioners' New York State Freedom of Information Law lawsuits were still pending. The Court of Appeals noted that Petitioners (1) participated fully in the public process, both during the two-day public hearing and during the subsequent comment period during which time they submitted more than 10,000 pages of documents into the record; (2) had "unfettered access to" the entirety of the administrative record, including the documents that formed the basis for ESDC's decision; and (3) had failed to establish the materiality of any of the documents at issue in their Freedom of Information Law requests. Petitioners challenge that determination as well, but that challenge is also unworthy of this Court's review, as it has no implications beyond this particular case. Indeed, Petitioners scarcely suggest otherwise, as they concur with the legal standard that the Court of Appeals applied to determine whether they received due process.

In sum, this case raises no issue of takings law of general importance warranting this Court's review.

STATEMENT

A. The Proposed Project

Despite Petitioners' assertions to the contrary, the Manhattanville area of West Harlem in New York City has been plagued for decades by depressed conditions. Numerous urban renewal initiatives have been proposed since the 1950s, but none has been successfully implemented. Only three new buildings have been erected in the area of the Project Site since 1961– a government-owned bus depot, a gas station and a now-vacant U-Haul Truck rental structure – and the area is afflicted by deteriorating structures and other substandard and insanitary conditions.[1]

The Project at issue in this case will transform 17 blighted acres in Manhattanville into a modern, gateless, open, urban campus of Columbia.[2] The Project calls for the creation of new academic facilities to replace blighted parcels in a bleak, long-stagnant, industrial area with outmoded manufacturing buildings. Those new facilities – classrooms, academic research facilities, faculty offices, libraries, university housing, and study and performance spaces – are essential to the

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[1] A-5403.

[2] The Project is described more fully in ESDC's General Project Plan. A-2520-93.

academic research, teaching, learning, and discourse at the core of higher education.

The Project includes buildings to be dedicated to advanced academic research. Among the first buildings to be constructed as part of the Project will be the Jerome L. Greene Science Center for Columbia's Mind, Brain and Behavior Initiative for the study of neurological diseases, such as Alzheimer's, Parkinson's, autism, dementia and schizophrenia. Restrictive declarations will prohibit Columbia, a non-profit educational institution, from using the Project Site to conduct scientific research as a commercial enterprise.

An essential component of the Project is a nearly two million gross square-foot, continuous, multi-level below-grade facility, which will extend from West 129th Street to West 133rd Street between Broadway and 12th Avenues (the "Below-Grade Facility"). The Below-Grade Facility will provide integrated space for all of the new buildings to be constructed on the main portion of the Project Site – 13 of the total 16 new buildings that will comprise the Project. By providing below-grade space for central energy facilities, science support, mechanical operations, and loading, freight and parking facilities that service most of the Project's new construction, the Below-Grade Facility will minimize street congestion and its attendant mobile source emissions and reduce the density of above-grade development, thereby making room for new public open spaces, wider sidewalks and improved sight lines.

The Below-Grade Facility makes necessary the acquisition of substantially all of the parcels within the Project Site, either by negotiation or (if necessary) by eminent domain.[3] Four of the six properties owned by Petitioners are situated diagonally across the main portion of the Project Site.[4] As a result, the Below-Grade Facility and its benefits – and indeed the Project itself – cannot be realized unless those properties are acquired.

The Project will benefit the City and State of New York and the area of West Harlem by (1) eliminating blighted conditions at the Project Site, (2) furthering higher education and academic research and enhancing the City and State as centers for these activities, (3) creating much-needed, park-like open space in the area, and (4) creating new employment opportunities. The Project is estimated to cost $6.28 billion, and will be funded by Columbia without taxpayer subsidies.[5]

In connection with the Project, Columbia will also provide other civic benefits, including (1) a community benefits fund of $76 million, (2) $20 million of support for affordable housing, (3) $20

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[3] The only private property owners subject to ESDC's exercise of eminent domain in this case are Petitioners, who own four self-storage facilities and two gas stations.

[4] A-87a (identifying Tuck-It-Away, Inc. as the owner of Block 1997, Lot 44 and Block 1998, Lot 29 and Tuck-It-Away Bridgeport, Inc. as the owner of Block 1996, Lot 56); A-198a (identifying P.G. Singh Enterprises, LLC as the owner of Block 1996, Lot 35).

[5] Pet. 4a.

million in contributions to the Harlem Community Development Corporation (an ESDC subsidiary) to support initiatives benefiting the greater Harlem community, and (4) support valued at $30 million in connection with a New York City public school to be operated in partnership with Columbia's Teachers College.[6]

B. ESDC And The Eminent Domain Process

In 1968, the New York State legislature created New York State Urban Development Corporation, a public benefit corporation which does business as ESDC. *See* Urban Development Corporation Act (the "UDC Act") (codified at N.Y. Unconsol. Laws §§ 6251-87). One of ESDC's primary roles is to foster revitalization of distressed areas by eliminating blight and facilitating industrial, residential and civic projects. Among ESDC's important revitalization tools is its power of eminent domain. *See* N.Y. Unconsol. Laws §§ 6254-55, 6263.

Under the UDC Act, ESDC is authorized to carry out specified types of projects, including Land Use Improvement Projects and Civic Projects. The UDC Act defines a Land Use Improvement Project as a "plan or undertaking for clearance, replanning, reconstruction and rehabilitation ... of a substandard and insanitary area, and for recreational or other facilities incidental or attendant thereto...." *Id.* §§ 6253(6)(c) and 6260(c). A Civic Project is defined as a "project ... designed and intended for the purpose of providing facilities

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[6] A-2567, A-2571.

for *educational*, cultural, recreational, community, municipal, public service or other civic purposes." *Id.* § 6253(6)(d) (emphasis added). Unlike a Land Use Improvement Project, a Civic Project is not predicated upon a determination by ESDC that the area is "substandard or insanitary."

To exercise its power of eminent domain, ESDC must comply with New York's Eminent Domain Procedure Law ("EDPL"), which establishes comprehensive procedures for extensive up-front public review and input followed by judicial review. Under the EDPL, a condemning authority must first notice and conduct a public hearing to solicit public comment on the proposed project. EDPL § 201; *see also* EDPL §§ 202-203. The condemning authority must then issue and publish its "determination and findings" specifying, among other things, "the public use, benefit or purpose to be served by the proposed public project." EDPL § 204(A), (B)(1).

Any "aggrieved" person may challenge the determination and findings by filing a petition directly in the Appellate Division of State Supreme Court. EDPL §§ 207(A), (B), 208. The Appellate Division "shall either confirm or reject the condemnor's determination and findings" after reviewing the record and considering the public use, benefit or purpose to be served by the project, the constitutionality of the proposed taking, the statutory authority of the condemnor to acquire the property, and the condemnor's compliance with the EDPL and New York State's Environmental Conservation Law. EDPL § 207(C). Upon the acquisition of property by eminent domain, the

property owner is entitled to receive just compensation, which is determined in an adversarial proceeding. *See* EDPL Art. 5.

The EDPL's procedures have been held to satisfy due process requirements. *See Brody v. Vill. of Port Chester*, 434 F.3d 121,134-36 (2d Cir. 2005); *Goldstein v. Pataki*, 516 F.3d 50, 55 (2d Cir.), *cert. den.*, 128 S. Ct. 2964 (2008).

C. The Public Process For The Project Conducted By The City Of New York And ESDC

The public process for the Project was extensive and spanned over four years. It began when the New York City Planning Commission ("CPC") first considered rezoning 35 acres of West Harlem, including the 17-acre Project Site (the "Rezoning"). This triggered an extensive public review pursuant to the City's Uniform Land Use Review Procedure ("ULURP"). CPC considered the potential environmental impacts of the Rezoning in an Environmental Impact Statement ("EIS"), which evaluated nine alternatives to the Project.[7] A draft EIS was published for public review, comment and hearings before being revised as a Final EIS ("FEIS").

On November 26, 2007, CPC approved the Rezoning for the Project to facilitate the construction of "modern, state-of-the-art educational and research facilities" in the context of "a new urban campus environment" that will be "integrated with the urban grid, with all streets

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[7] A-158 (FEIS, Chapter 24, *Alternatives*).

remaining open to the public ... and a new open space network open to University-affiliated personnel and the general public alike."[8] CPC further found that Columbia "is a major educational institution and center of state-of-the-art research in the sciences and humanities, and makes a valuable contribution to the intellectual, scientific and cultural life of the City."[9]

Based on a careful review, CPC concluded that "the open space network, Central Below-Grade Service Area, and other beneficial features of the Columbia proposal" may require the use of eminent domain,[10] and that the exercise of eminent domain "would serve a public purpose insofar as it would allow for realization of the public benefits of the Columbia proposal."[11]

After the City Council approved the Rezoning on December 19, 2007, ESDC adopted a proposed General Project Plan ("GPP") for the Project as both a Land Use Improvement Project and a Civic Project on July 17, 2008. The GPP, together with the Rezoning, would allow the development of a Columbia campus that would include academic and research facilities, university-related housing, more than two acres of publicly accessible open space and street-level uses

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[8] A-2081.

[9] A-2079.

[10] A-2090.

[11] A-2093.

that will transform the Project Site into a vibrant, attractive urban streetscape.[12]

ESDC solicited public comment on the GPP and its proposed use of eminent domain in connection with the Project. ESDC held a duly-noticed public hearing on September 2 and 4, 2008. In connection with the hearing notice, ESDC made available copies of the GPP, the FEIS and the two neighborhood conditions reports separately prepared by ESDC's consultants, AKRF and Earth Tech. (ESDC hired Earth Tech to conduct an independent neighborhood conditions study after being criticized for engaging AKRF, which had performed work for Columbia on matters relating to the Project Site.) Each of those two consultants photographed and conducted detailed inspections and assessments of each of the lots in the Project Site, documenting physical and structural conditions, health and safety concerns, vacancy rates, site utilization, property ownership, building code violations, environmental hazards and crime data.[13] The public hearing was well attended and 98 attendees, including Petitioners and their counsel, spoke about the Project.[14]

During the public comment period, Petitioners submitted two legal memoranda and more than 10,000 pages of materials.[15] They

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[12] A-3063; A-2585, A-2587 and A-2591 (GPP, Exs. C, D & F).

[13] A-1142-43; A-996-97.

[14] A-990-1132, A-1133-1414, A-1415-1706, A-1135, A-1192-96, A-1417, A-1418, A-1420, A-1483-99, A-1569-79.

[15] A-1732-56, A-1757-70, A-1771.

focused much of their comments on critiquing the FEIS and neighborhood condition reports that served as the factual underpinning for ESDC's proposed finding, set forth in the draft GPP, that the Project Site is a substandard and insanitary area. Petitioners even submitted their own "No Blight" study utilizing the extensive documentation provided by ESDC and their own investigation of site conditions. ESDC subsequently prepared a 75-page document entitled "Response to Comments" that addressed the comments received from Petitioners and others and prepared a GPP that was modified in certain respects in response to public comment.[16]

Petitioners and their counsel made additional and extensive comments at the December 18, 2008 meeting at which ESDC's Directors affirmed the revised GPP.[17] The revised GPP, like the draft GPP, made the findings to approve the Project as a Land Use Improvement Project and as a Civic Project under the UDC Act.[18] At the same meeting, ESDC's Directors approved ESDC's 83-page New York State Environmental Quality Review ("SEQRA") Statement of Findings and made its Determination and Findings pursuant to EDPL § 204.[19]

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[16] A-2868-2942.

[17] A-3145-3255.

[18] A-2574-A-2579

[19] A-3231 and A-3231. In accordance with Rule 15.2 of this Court, ESDC objects to Petitioners' repeated statements that the there is no comprehensive or integrated plan for the Project. *See, e.g.*, Pet. 2, 3, 25.

D. The Freedom Of Information Law Litigation

Both before and during the EDPL process, Petitioners served numerous Freedom of Information Law ("FOIL") requests on ESDC and other agencies seeking Project-related documents.[20] In response, ESDC turned over about 8,000 pages of material. ESDC did not withhold any of the documents that formed part of the administrative record, including the GPP (as initially adopted for public comment by ESDC), the FEIS and the AKRF and Earth Tech neighborhood conditions studies. All of those documents were in the public domain during the EDPL public comment period.[21]

In connection with some of their FOIL requests, Petitioners filed N.Y. Civil Procedure Law and Rules Article 78 proceedings requesting orders directing ESDC to disclose documents withheld under FOIL exemptions. The Supreme Court for New York County ordered ESDC to make a further production, and the Appellate Division affirmed in part. *See Tuck-It-Away Assocs., L.P. v. ESDC*, 54 A.D.3d 154 (1st Dep't 2008). With respect to seven documents, ESDC successfully sought leave to appeal the disclosure order to the New York Court of Appeals. The Court of Appeals ultimately affirmed. The Court of Appeals did not hold that ESDC improperly categorized any of the documents

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[20] A-1734.

[21] A-996-97; A-1142-43, A-1426-27.

as exempt from disclosure under FOIL.[22] Rather, the Court upheld the disclosure order on the basis that ESDC had not sufficiently articulated a particularized reason for denying disclosure of these documents prior to the commencement of the FOIL litigation.

Here, as explained below, the Court of Appeals expressly held that Petitioners failed to demonstrate that any of the documents withheld under FOIL were material to this matter.[23]

E. Petitioners' Claims And The Decisions Below

Petitioners own four self-storage facilities and two gas stations within the Project Site. They challenged the Project on multiple grounds in the Appellate Division. Petitioners claimed that the proposed condemnations will not serve a public purpose, that ESDC's finding that the Project Site is blighted was made in bad faith and on the basis of an unconstitutionally vague statute, and that the Project serves only the private interests of Columbia. Petitioners also asserted that their due process rights were violated by ESDC's closing of the administrative record before some of their FOIL lawsuits were resolved.

On December 3, 2009, the Appellate Division granted the Petitions and annulled ESDC's Determination and Findings. A two-judge plurality

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[22] *See West Harlem Bus. Group v. ESDC*, 13 N.Y.3d 882, 884-85 (2009); Pet. 9a-10a.

[23] Pet. 30a-31a.

conducted a *de novo* review of ESDC's blight findings and concluded that the Project lacked a public purpose. These two judges also held that the UDC Act's authorization of eminent domain for Civic Projects serving "educational" purposes did not extend to projects involving private, non-profit educational institutions such as Columbia. A third judge, who concurred in the result, concluded that Petitioners' due process rights were violated when ESDC closed the administrative record before all appeals in the FOIL litigations had been heard and decided.

Two judges dissented, concluding that (1) Petitioners' objections to ESDC's Determination and Findings merely presented a "difference of opinion" as to the conclusions to be drawn from the evidence, in which event the courts should defer to the agency; (2) ESDC did not exceed its statutory authority under the UDC Act in designating the Project a "land use improvement project" and a "civic project"; (3) ESDC's finding that the Project will serve a public purpose was neither irrational nor baseless; and (4) there was no basis for Petitioners' contention that ESDC closed the record prematurely.

On June 24, 2010, the Court of Appeals unanimously reversed the Appellate Division's decision. The Court held that the Project would serve two separate public purposes – remediation of blight and advancement of education.[24]

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[24] One judge concurred in the result, agreeing that the Project should be sustained as a Land Use Improvement Project to remediate blight, and that Petitioners' due process rights were

The Court of Appeals first upheld ESDC's determination that the Project will rehabilitate a blighted area by replacing dilapidated buildings with modern buildings and creating much-needed publicly-accessible open space. Based on its review of the extensive administrative record, the Court concluded that "there is record support – 'extensively documented photographically and otherwise on a lot-by-lot basis' – for ESDC's determination that the Project Site was blighted."[25] The Court also found that ESDC utilized "objective data ... in its findings of blight."[26] More specifically, "ESDC considered a wide range of factors including the physical, economic, engineering and environmental conditions at the Project site. Its decision was not based on any one of these factors, but on the Project site conditions as a whole."[27]

The Court of Appeals rejected Petitioners' allegations that ESDC acted "in 'bad faith' and with pretext when it concluded that the Project Site was blighted."[28] The Court stressed that ESDC's findings were based on "objective data,"[29] citing three independent studies in the record which documented the blighted physical conditions in the

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not violated by the closure of the administrative record before completion of the FOIL litigation. Pet. 32a-34a.

[25] Pet. 19a (citation omitted).

[26] Pet. 19a.

[27] *Id.*

[28] Pet. 20a.

[29] Pet. 19a.

area, the first of which was prepared at a time when Columbia was only beginning to purchase property there.

The Court of Appeals further held that the statutory term "substandard or insanitary area" should not be deemed void for vagueness. The Court held that "it is not necessary that the degree of deterioration or precise percentage of obsolescence or mathematical measurement of other factors be arrived at with precision (*Yonkers Cmty. Dev. Agency*, 37 N.Y.2d [478] at 484)."[30] The Court also pointed out that the U.S. Supreme Court, in *Berman v. Parker*, 348 U.S. 26, 33-34 (1954), "held that blight is an elastic concept that does not call for an inflexible, one-size-fits-all definition."[31]

The Court of Appeals also held that the Project independently qualifies as a Civic Project under the UDC Act because its purpose "is unquestionably to promote education and academic research while providing public benefits to the local community."[32] In so ruling, it rejected Petitioners' contention that the UDC Act limits a proposed educational project to public educational institutions. The Court also held that New York has long recognized "that schools, both public and

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[30] Pet. 21a (internal quotation omitted).

[31] Pet. 22a (*citing Berman v. Parker*, 348 U.S. 26, 33-34 (1954)).

[32] Pet. 26a.

private, 'serve the public's welfare and morals,'"[33] and it stressed that education is an "indisputably public purpose" and that "education and the expansion of knowledge are pivotal government interests."[34] Moreover, the Court noted that, because Columbia is a non-profit educational institution, "the concern that a private enterprise will be profiting through eminent domain is not present."[35] And it explained that the Project will "bestow numerous other significant civic benefits to the public," including the creation of "two acres of publicly accessible open space," upgrades in transit infrastructure, and the creation of 14,000 construction jobs and 6,000 permanent jobs.[36]

Finally, the Court of Appeals rejected Petitioners' claim that their due process rights were violated. The Court held that Petitioners had a meaningful opportunity to be heard because they had had "unfettered access" to the documents that formed the basis for ESDC's decision and had fully participated in the public process. The Court also ruled that Petitioners failed to establish that any of the documents at issue in the FOIL litigation (which are not in the record in this case, but which the Court of Appeals had examined) was material to ESDC's eminent domain determination.

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[33] Pet. 26a (*quoting Cornell Univ. v. Bagnardi*, 68 N.Y.2d 583, 593 (1986)).

[34] Pet. 26a.

[35] Pet. 26a.

[36] Pet. 3a-4a, 26a-27a.

REASONS FOR DENYING THE PETITION

POINT I

THE "PUBLIC USE" ISSUE PRESENTED IN THE PETITION DOES NOT WARRANT THIS COURT'S REVIEW

A. The Court Of Appeals' Decision Raises No Important Issue Warranting Review

Petitioners argue that this case raises the question "whether *Kelo* controls whenever courts are confronted with evidence of impermissible governmental favoritism and pretext in an eminent domain proceeding."[37] In fact, this case does not raise that question. The Court of Appeals never suggested that the issue of pretext was irrelevant to this case, and it examined Petitioners' claims of bad faith and pretext and rejected them on the merits, holding that Petitioners' pretext claim was "unsubstantiated by the record." The Court concluded that Petitioners had failed to make out a plausible claim of pretext, given (1) the overwhelming evidence in the administrative record supporting ESDC's determination that the Project Site was blighted, (2) ESDC's undisputed determination that the Project advances educational purposes, and (3) Petitioners' failure to substantiate their allegations of bad faith and pretext.

Petitioners contend, however, that "the instant case presents such a clear example of the

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[37] Pet. 18.

sort of bad faith, pretext, and favoritism toward a pre-determined beneficiary that one could only conclude ... that 'a private purpose was afoot.'"[38] In so arguing, Petitioners merely challenge the Court of Appeals' conclusion in this particular case that the record supports ESDC's conclusion that the Project Site suffers from longstanding deteriorated conditions and that Petitioners had failed to substantiate their conclusory allegations of bad faith and pretext. That factbound determination raises no issue warranting review by this Court.[39]

Moreover, the Court of Appeals properly rejected Petitioners' claims of bad faith and pretext. In particular, the Court of Appeals rejected Petitioners' contention that ESDC's finding that the Project Site was blighted was tainted by ESDC's use of AKRF, a consultant that had previously worked for Columbia.[40] The Court of Appeals noted that, as a measure of caution and in response to criticism of its use of that consultant, ESDC engaged a second consulting firm, Earth Tech, which had no prior relationship to Columbia and which conducted an independent review and also arrived at the conclusion that the Project Site was blighted.[41] The Court further determined that,

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[38] Pet. 18. (quoting *Kelo v. City of New London*, 545 U.S. 469, 487 (2005) ("*Kelo*")).

[39] Sup. Ct. Rule 10; *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 176 n.8 (1981) (improvident grant of cross-petition that presented "primarily a question of fact," "which does not merit Court review").

[40] Pet. 20a.

[41] Pet. 20a.

"[c]ontrary to petitioners' assertions, Earth Tech did not merely review and rubber stamp AKRF's study, but conducted its own independent research and gathered separate data and photographs of the area before arriving at its own conclusions."[42] Earth Tech's analysis strongly supported ESDC's blight finding; as the Court explained, Earth Tech "determined that since 1961 there was a dearth of new construction in the area ... [and] enumerated the extensive building code violations in the area and the chronic problems that the buildings had with water infiltration."[43] Earth Tech also "found that many of the buildings in the Project site had deteriorated facades and that several of the buildings had been sealed by the New York City Fire Department because of unsafe conditions."[44] In sum, Earth Tech concluded that the neighborhood conditions created "'a blighted and discouraging impact on the surrounding community.'"[45]

The Court of Appeals also rejected, as unsupported by the record, Petitioners' contention that Columbia was responsible for the blight in the

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[42] Pet. 20a.

[43] Pet. 11a.

[44] The amicus brief filed by Senator Perkins incorrectly states on page 2 that ESDC "determined" that Petitioners' properties were "well-maintained." In fact, Petitioner Tuck-It-Away owned one building that had to be evacuated to avoid imminent collapse, and, its four parcels, taken together, had more than three times the average number of building violations as the parcels acquired by Columbia over the previous several years. Pet. 11a.

[45] Pet. 11a (quoting the Earth Tech report).

area by purchasing buildings and allowing them to fall into disrepair. The Court of Appeals noted that in 2003, when Columbia was just beginning to acquire property in the neighborhood, another study conducted by a different consultant, Urbitran, retained by a different agency "unequivocally concluded that there was 'ample evidence of deterioration of the building stock in the study area' and that 'substandard and unsanitary conditions were detected in the area.'"[46]

In sum, the Court of Appeals correctly concluded that the record amply supports ESDC's blight finding and contains no support for Petitioners' allegations of bad faith.

Petitioners assert that their allegations of pretext are supported by an ambiguous e-mail written by an ESDC staff attorney who had no role in the Project or its approval.[47] Although the e-mail was not part of the record below, it was before the Court of Appeals in connection with Petitioners' FOIL proceeding. The Court considered the e-mail, as evidenced by an exchange that took place during oral argument. When Petitioners' counsel read from the e-mail, one judge commented, "you're not really saying that this transforms the case? It's the same case with or without that document, isn't it?"[48]

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[46] Pet. 23a.

[47] Pet. 96a.

[48] http://www.nycourts.gov/ctapps/arguments/2010/Jun10/Jun10_OA.htm at 31:48-32:45 (video of Court of Appeals argument).

The Court of Appeals recognized that ambiguous, subjective musings of a staff attorney not working on a project are immaterial. Where, as here, the objective record demonstrates that the proposed condemnation will further numerous, substantial public purposes, an email authored by an agency employee not involved in the condemnation could not negate the objective public purposes served by the project. A contrary rule of law would encourage harmful fishing expeditions into the multi-faceted subjective motivations of staff and public officials. *Cf. Edwards v. Aguillard*, 482 U.S. 578, 636-37 (1987) (Scalia, J., dissenting) ("[W]hile it is possible to discern the objective 'purpose' of a statute (i.e., the public good at which its provisions appear to be directed), ... discerning the subjective motivation of [a legislative body] is ... almost always an impossible task.").

B. The Court Of Appeals' Decision Is Consistent With Kelo

Petitioners, joined by its amici, raise a broadside challenge to the Court of Appeals' employment of a deferential standard of review to determine whether the proposed condemnation in this case advances a public use. The Court of Appeals did not err in doing so. As this Court reaffirmed in *Kelo*, "public use jurisprudence has wisely ...afforded legislatures broad latitude in determining what public needs justify the use of the takings power." 545 U.S. at 483. Because "[t]he role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one," *Berman*, 348 U.S. at 32, a court should not "substitute its judgment for a

legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'" *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (quoting *United States v. Gettysburg Elec. Ry.*, 160 U.S. 668, 680 (1896)).

Petitioners criticize the Court of Appeals for not citing *Kelo* and for expressly deciding this case under the New York Constitution rather than the federal Constitution. The Court of Appeals may have assumed, however, that the "public use" requirement of Art. I, § 7(a) of the New York Constitution was at least as protective of property rights as the analogous provision of the Fifth Amendment of the U.S. Constitution, and thus may have found it unnecessary expressly to address the federal question. *See In re Goldstein v. New York State Urban Dev. Corp.*, 13 N.Y.3d 511, 550-51 (2010) (Smith, J., dissenting) (noting that Court of Appeals avoided holding that the private property protections of New York Constitution's public use provision are limited to those of the federal constitutional clause).

Petitioners argue that the Court of Appeals should have applied "the lengthy list of procedural safeguards" upon which Justice Kennedy purportedly "conditioned his tie-breaking concurrence" in *Kelo*.[49] Petitioners misread Justice Kennedy's opinion. Justice Kennedy "join[ed] the opinion for the Court and add[ed] ...further observations," commenting on the factual details in

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[49] Pet. 18.

New London's economic development plan.[50] He also reaffirmed the deferential standard of review set forth in this Court's prior jurisprudence.[51]

Moreover, nothing in *any* of the opinions in *Kelo* suggests – as Petitioners contend – that the government is required by the Constitution to send out a "request for proposals" when it is considering an exercise of eminent domain that would, in and of itself, advance a public purpose.[52] As even the dissent in *Kelo* agreed, where the proposed taking will eradicate longstanding blight, as is the case here, a public purpose would be achieved directly when the "harmful use" is eliminated.[53]

Here, the condemnation of Petitioners' properties will not only eliminate a "harmful use," it will also promote higher education.[54] The Court

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[50] 545 U.S. at 491-93.

[51] *Id.* at 490-91.

[52] Petitioners suggest that the Project escaped meaningful public scrutiny because ESDC did not initiate a competitive bidding process and because Columbia agreed to pay for the costs of the Plan. Pet. 23-24. There can be no serious contention that public scrutiny and accountability were lacking in this case. Many public entities in the City and State of New York had input into the proposed condemnation decision, as did the general public. The CPC and ESDC obtained information from the public using the alternative means of holding hearings and public comment periods under SEQRA, ULURP and the EDPL. ESDC approved the Project only after years of planning and after public notice, comment discussion and the City's Rezoning.

[53] *Kelo,* 545 U.S. at 500.

[54] Pet. 26a.

of Appeals recognized that higher education, academic research and expansion of knowledge are "pivotal government interests" which "serve the public's welfare and morals" and that "[t]he indisputably public purpose of education is particularly vital for New York City and the State to maintain their respective statuses as global centers of higher education and research."[55] Thus, as an independent ground for its decision, the Court of Appeals concluded that the Project is a valid exercise of eminent domain because "the purpose of the Project is unquestionably to promote education and academic research while providing public benefits to the local community."[56] Petitioners do not explain how their claim of pretext — which challenges the propriety of ESDC's blight determination — could undermine that conclusion, given that no finding of blight is necessary for approval of a Civic Project to advance education.[57] Indeed, Petitioners do not deny that the Project facilities will be used for educational purposes by Columbia, a non-profit university.[58]

Moreover, it could hardly be impermissible – or considered to be pretextual – for the government

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[55] *Id.*

[56] *Id.*

[57] *See* p. 6-7, *supra*, p. 33-34, *infra*.

[58] Petitioners did not challenge the constitutionality of the UDC Act pertaining to Civic Projects. Pet. 27a n.9. Yet, as noted by the Court of Appeals, the Project's status as an educational project provides an alternate basis for ESDC's public use determination independent of ESDC's blight finding.

to exercise eminent domain for the purpose of advancing education merely because the government knows – and, indeed, publicizes – in advance which educational institution will construct educational facilities on the acquired property. To so hold would effectively invalidate many well-settled uses of eminent domain to advance a public purpose through the instrumentality of a private party, including the grants of rights-of-way to railroads and utility companies so that the public may receive vital services. Nothing in *Kelo* suggests that the Court's concern about the use of eminent domain for a purely "private purpose" (545 U.S. at 487) reaches so far as to require the government to be unaware of the identity of any private beneficiary when the government authorizes the exercise of eminent domain for a public benefit. *See Kelo*, 545 U.S. at 482 (reaffirming ruling in *Midkiff*, 467 U.S. at 244, that a taking does not violate public use requirement merely because private parties ultimately receive the property, as "'it is only the taking's purpose, and not its mechanics,' ... that matters in determining public use").

C. There Is No Conflict Among The Lower Courts That Warrants This Court's Review

Petitioners argue that "no consensus yet exists among the lower courts regarding whether *Kelo*'s pretext analysis should apply to all eminent domain takings or only to those asserting economic development as a public purpose."[59] Whether or

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[59] Pet. 26.

not there is such uncertainty in some lower courts, it is of no moment here, because the Court of Appeals never suggested that pretext was irrelevant in this case, where the condemnation is for the purposes of remediating blight and advancing education, not economic development as understood in *Kelo*. The Court of Appeals squarely considered Petitioners' contention that "ESDC acted in 'bad faith' and with pretext when it arrived at its determination"[60] and rejected that argument as unsupported by the record.[61] That factbound conclusion does not warrant this Court's review.

Because the Court of Appeals reached the pretext issue on the merits and held Petitioners' pretext allegations to be devoid of record support, the legal issue supposedly in disarray in the lower courts – whether the "mere pretext" doctrine applies outside the context of using eminent domain to foster economic development – would not affect the outcome of this lawsuit. If this Court were to hold that the "mere pretext" doctrine should be limited to economic-development takings, then the judgment of the Court of Appeals would be *affirmed* because the public purposes in this case are blight eradication and the construction of educational facilities. Yet if the Court were to hold that the "mere pretext" doctrine should apply in all eminent domain cases, then the judgment of the Court of Appeals would similarly be *affirmed* because the Court of Appeals has already

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[60] Pet. 20a.

[61] *See* pp. 15, 21, *supra*.

determined, based on its review of the voluminous record of proceedings before the CPC and ESDC, that there is no factual basis for Petitioners' "pretext" allegations in this case. Thus, the legal issue supposedly in disarray in the lower courts is not presented here and could not warrant granting the certiorari petition.

In any event, the Petition cites only a handful of cases to establish a supposed conflict in the scope of "pretext" review after *Kelo*. The fact that the Petition cites so few cases suggests that whatever conflict may exist is limited in nature and would benefit from further "percolation" in the lower courts. Since so few cases are cited as even having addressed the issue of pretext after *Kelo*, it is evident that the issue of pretext has not been thoroughly explored by the lower courts, and review by this Court would be premature. Moreover, as explained below, the very cases cited by Petitioners demonstrate that there is no substantial conflict among the lower courts.

Petitioners rely on *Franco v. National Capital Revitalization Corp.*, 930 A.2d 160 (D.C. 2007), where the D.C. Court of Appeals reversed the trial court's striking of a public use defense to a condemnation. There, a draft bill authorizing the condemnation "did not explain why the properties were 'necessary' or to what 'public use' they would be devoted." *Franco*, 930 A.2d at 163. The District of Columbia Council later passed a bill approving the condemnation, but the final bill included findings that were neither in the draft bill nor were the subject of a public hearing. Those findings asserted in conclusory fashion that the properties

were part of a complex that was "a blighting factor" in the nearby communities. *Id.* There was no record that supported this legislative "finding," and no opportunity for the public to contest the finding.

Mr. Franco challenged the taking of his property by asserting that the stated public purpose was pretextual. Concluding that Mr. Franco had properly pled a pretext claim, the Court of Appeals stated that while the "legislation recites that NCRC [the condemning agency] had 'advised the Council that the Skyland Shopping Center is blighted,' . . according to Mr. Franco, NCRC admitted that it had made no such finding." *Id.* at 171.

The *Franco* decision does not conflict with the decision below. The court in *Franco* rejected the trial court's conclusion that, "once the legislature has declared that there is a public purpose for a condemnation, an owner is foreclosed as a matter of law from demonstrating that the stated reason is a pretext," and thus allowed the plaintiff to make his case on remand. 930 A.2d at 168. The Court of Appeals in this case suggested nothing to the contrary; indeed it reviewed the merits of Petitioners' allegations of pretext. Moreover, the *Franco* court, like the court below in this case, recognized that litigation of a pretext claim is properly limited to review of the objective record underlying a public use determination: "if the record discloses ... that the taking will serve 'an overriding public purpose' and that the proposed development 'will provide substantial benefits to the public,' the courts must defer to the judgment of the legislature." *Id.* at 174. *Franco* also noted –

consistent with the Court of Appeals' decision in this case – that the *Kelo* court did not suggest a taking will *per se* fail the public use requirement whenever "the identities of the benefiting private parties were known before the taking was authorized by the legislature." *Id.* at 175.

The Hawaii Supreme Court's decision in *County of Hawai'i v. C & J Coupe Family Ltd. Partnership*, 119 Haw. 352, 198 P.3d 615 (2008), is very similar. In that case, the lower court had initially rejected the condemnation after concluding that the County by resolution had illegally delegated its power of eminent domain through an agreement with a private developer. 198 P.3d at 644 n.34. Based on that agreement, the Court concluded that the project would not serve a public purpose. *Id.* After the County approved an amended resolution, which deleted any reference to the development agreement, the lower court found that the same project would serve a public purpose. *Id.* at 646. A divided Supreme Court of Hawaii reversed, finding that the lower court based its finding not on a review of the objective data in the record, but merely on the stated public purpose in the County's resolution. *Id.* This was error, the court ruled, because the trial court was obligated to consider the plaintiff's claim of pretext notwithstanding the resolution's assertion of a public purpose. *Id.* at 647. No such error is present here, where the Court of Appeals considered (and rejected) Petitioners' pretext claim on the merits.

The additional cases cited by Petitioners also do not conflict with the decision below. In *Rhode*

Island Economic Development Corp. v. The Parking Co., L.P., 892 A.2d 87 (R.I. 2006), the condemning authority already had a lease on and an option to purchase the property it sought to condemn. The record before the court indicated that the parties could not agree on a price for the purchase of the property and the condemnation was merely an effort to avoid further negotiations and to increase revenue for the government authority. The court stressed, however, that "it is not for this Court to question whether a taking ... will accomplish its intended goals because the [C]onstitution is satisfied if the Legislature '*rationally could have believed* that the [enactment] would promote its objective.'" *Id.* at 103 (quoting *Midkiff).* This deferential standard of review does not conflict with the Court of Appeals decision below.

In *Middletown Twp. v. Lands of Stone*, 595 Pa. 607, 939 A.2d 331 (2007), the Township sought to acquire property under a statute that authorized the use of eminent domain for recreational purposes; yet there was no evidence in the record that the Township planned any such recreational project, only that it had considered "various recreational options." Rather, the record showed that the Township decided to acquire the property to preserve open space and prevent development, purposes for which it had no authority to condemn property. Thus, the record objectively showed that the condemnation was not intended to accomplish its stated objective, which was a mere pretext. The opposite is true here; as the Court of Appeals explained, the record amply supports ESDC's conclusions that the condemnation was properly

authorized to remediate blight and to advance education.

POINT II

THE PROCEDURAL DUE PROCESS ISSUE PRESENTED IN THE PETITION DOES NOT WARRANT THIS COURT'S REVIEW

The Court of Appeals correctly held that Petitioners' due process rights were not violated when ESDC closed the administrative record pursuant to the EDPL before the FOIL requests made by the Tuck-It-Away Petitioners were resolved. That narrow conclusion does not warrant this Court's review.

A. Petitioners Do Not Present Any Important Legal Issue Warranting This Court's Review

Petitioners do not argue that New York's EDPL is unconstitutional on its face or inherently denies property owners a fair opportunity to be heard on the question whether a proposed condemnation is for "public use." The Second Circuit has upheld, after *Kelo*, the EDPL procedures against a due process challenge, observing that the EDPL gives property owners a fair opportunity to be heard on the issue of public use before property is taken. *See Brody v. Village of Port Chester*, 434 F.3d at 135-36; *Goldstein v. Pataki*, 488 F. Supp.2d 254, 272 (E.D.N.Y. 2007), *aff'd*, 516 F.3d 50, 55 (2d Cir.), *cert. denied*, 128 S. Ct. 2964 (2008). Petitioners do not challenge those decisions; they do not argue, for example, that the

Due Process Clause requires discovery or full trial-type proceedings in a challenge to a "public use" determination.

Rather, Petitioners argue that, in this particular case, they were denied due process because ESDC did not hold open the administrative record until final completion of their FOIL litigation. But even then, Petitioners do not contend that the Court of Appeals applied the wrong test for due process or failed to assign the correct weight to their interest in the due process balance. Indeed, the Court of Appeals' decision applied the same legal standard – that a condemnee be provided with an opportunity to be heard in a meaningful manner at a meaningful time – that the Petition urges upon this Court.[62] *See Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). This legal standard is not in dispute by any party, nor is there any question that it was applied by the Court of Appeals. In short, Petitioners are really challenging the Court of Appeals' decision that they received due process in this particular case. That is not a basis for this Court's review.[63]

Furthermore, this case would not be an appropriate vehicle for consideration of any due process issue. Petitioners' challenge to ESDC's determination that the Project was an appropriate "Civic Project" for educational purposes rested

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[62] Pet. 33.

[63] *See* Sup. Ct. R. 10 (certiorari is "rarely granted" when the petition asserts "the misapplication of a properly stated rule of law").

entirely on a *legal* argument – namely, that under the UDC Act, eminent domain was authorized only for *public* educational institutions.[64] The Court of Appeals rejected that contention as a matter of law, concluding that eminent domain could be used to construct facilities for non-profit educational institutions such as Columbia.[65] Petitioners do not explain how the additional documents they sought under FOIL could have had any bearing on that issue of state law.

B. The Public Processes Provided By The Eminent Domain Procedure Law Comply With Due Process

As the Court of Appeals recognized, due process in the context of an agency determination requires that the agency provide an opportunity to be heard in a meaningful manner at a meaningful time. *Mathews*, 424 U.S. at 332. The opportunity must be appropriate to the nature of the case. *Mullane v. Cent. Hanover Trust Co.*, 339 U.S. 306, 313 (1950). Thus, due process is not a rigid rule unrelated to time, place and circumstances, but rather a flexible concept that calls for the procedural protection the particular situation demands. *Mathews*, 424 U.S. at 334.

The Court of Appeals also concluded, in applying the *Mathews* standard that, "[i]n this case, petitioners had an opportunity to comment on the proposed Project in a meaningful manner – both orally and through written submissions – and

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[64] Pet. 65a.

[65] Pet. 23a-27a.

at a meaningful time – well before ESDC issued its findings and determination to acquire petitioners' property by eminent domain."[66] The Petition does not identify any specific error in that decision. Petitioners do not dispute, for example, that ESDC held an extensive public hearing, that they were offered and took the opportunity to participate in that hearing, and that they submitted extensive comments for the record that ESDC then considered.

The Court of Appeals clearly reached the right result here. The Court explained that "petitioners' substantial opportunity to be heard is reflected in their extensive written submissions after the completion of the two-day public hearing." In addition, "prior to the ESDC determination, [Petitioners] had unfettered access to over 8,000 pages of documents including, most significantly, the GPP (as initially adopted by ESDC), the FEIS, and the AKRF and Earth Tech neighborhood conditions studies. All of these documents were available to the public during the comment period...."[67]

As a result of Petitioners' and others' vigorous participation in the public process, "ESDC prepared 75 pages of detailed responses to the comments received and duly considered their submissions before rendering its findings and determination."[68] Petitioners and their counsel

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[66] Pet. 28a-29a.

[67] Pet. 29a.

[68] *Id.*

once again objected to the Project at ESDC's December 18, 2008 meeting where the Directors voted to adopt SEQRA Findings, affirm the GPP, and issue the Determination and Findings to proceed with the Project.

Finally, review is unwarranted in light of the Court of Appeals' determination that the internal ESDC documents at issue in Petitioners' FOIL proceeding were not material and that Petitioners were not prejudiced by not obtaining them.[69] Petitioners provide no basis for this Court to review, much less overturn, that determination. Even if Petitioners were entitled to the documents under FOIL at the time of the hearing, a FOIL violation would not in and of itself establish a due process violation. Due process is violated only if Petitioners were deprived of an "opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews*, 424 U.S. at 333. To establish that a FOIL violation rose to the level of a due process violation, petitioners "must show that the withholding of the [documents] caused [them] prejudice." *Adams v. United States*, 673 F. Supp. 1249, 1260 (S.D.N.Y. 1987). Since the Court of Appeals concluded that Petitioners failed to demonstrate the materiality of the documents at issue, it properly determined that Petitioners were

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[69] Pet. 30a-31a. Moreover, Petitioners failed to seek vacatur of the automatic stay of disclosure when ESDC appealed the Appellate Division's decision. *Id.* Had they done so, the courts could have considered at an earlier juncture whether Petitioners would suffer harm by closure of the administrative record without those documents.

not prejudiced and correctly rejected their assertion that they were denied due process.[70]

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York
November 11, 2010

Respectfully submitted,

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[70] Pet. 30a-31a.

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Supreme Court, U.S.
FILED
NOV 22 2010
OFFICE OF THE CLERK

No. 10-402

IN THE

Supreme Court of the United States

TUCK-IT-AWAY, INC., et al.,

Petitioners,

v.

NEW YORK STATE URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF CITED AUTHORITIES	ii
REPLY BRIEF FOR PETITIONERS	1
I. The Applicability of *Kelo*	1
A. This Court Should Address the Serious Conflict that Exists Among Lower Courts	3
B. By Applying the Incorrect Standard of Review, The Court of Appeals Obscured Substantial Evidence Of Pretext and Favoritism	7
II. Petitioners' Due Process Claim	10
CONCLUSION	12

TABLE OF CITED AUTHORITIES

Page

CASES

City of Cincinnati v. Vester,
281 U.S. 439 (1930) 2

County of Hawai'i v.
C&J Coupe Family Ltd. P'ship,
198 P3d 615 (Haw. 2008) 5, 6

County of Hawai'i v. C&J Coupe Family,
No. 29887, 2010 Haw. App. LEXIS 661
(Haw. Nov. 10, 2010) 5

Franco v. Nat'l Capital Revitalization Corp.,
930 A.2d 160 (D.C. App. 2008) 5

Goldstein v. Pataki,
516 F3d 50 (2d Cir. 2008) 3

Kelo v. New London,
545 U.S. 469 (2005) ..... *passim*

Middletown Twp. v. Lands of Stone,
595 Pa. 607 (Penn. 2007) 6

In re Opening a Private Rd. ex rel. O'Reilly,
5 A.3d 246, 2010 Pa. LEXIS 2272
(Penn. Sept. 30, 2010) 6, 9

Residential Funding Corp. v.
DeGeorge Financial Corp.,
306 F3d 99 (2d Cir. 2002) 11

Cited Authorities

Page

West Harlem Business Group v. Empire State Dev. Corp., 13 N.Y.3d 882 (2009) 11

REPLY BRIEF FOR PETITIONERS

I. The Applicability of *Kelo*

Respondent does not dispute that this is the classic case of preselection of the developer – Columbia University. Instead, Respondent argues that "Petitioners' submission ... is no more than a challenge to [the Court of Appeals'] factbound determination and thus, does not warrant review by this Court."[1] This assertion is wrong.

Respondent misses the essence of Petitioners' challenge, and the importance of this case. In his concurrence in *Kelo v. New London*, Justice Kennedy warned of "categories of cases in which the transfers are so suspicious, or the procedures employed so prone to abuse, or the purported benefits are so trivial or implausible, that courts should presume an impermissible private purpose. . . " 545 U.S. 469, 493 (2005). Thus, deferential review of an administrative decision might not be warranted in certain circumstances, when "the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause." *Id.* As the New York Appellate Division correctly recognized, the preselection of Columbia University presents exactly these circumstances.

Remarkably, Respondent claims that the issue presented in this Petition, to wit, "whether *Kelo* controls

1. Respondent's Brief in Opposition ("Respondent's Brief") at 3.

whenever courts are confronted with evidence of impermissible governmental favoritism and pretext in an eminent domain proceeding," is not raised in this case because the Court of Appeals "examined Petitioners' claims of bad faith and pretext and rejected them on the merits, holding that Petitioners' pretext claim was 'unsubstantiated by the record'".[2] But the Court of Appeals' decision never cites *Kelo*, nor does it examine the factors that Justice Kennedy identified,[3] which the New York Appellate Division employed to analyze the evidence of pretext and favoritism here. Instead, when faced with the very factors that Justice Kennedy warned of, the Court of Appeals deliberately did not consider *Kelo*, instead deferring to a governmental administrative agency whose arguments the Court of Appeals relied upon wholesale.

The question of law that lies at the heart of this Petition is whether, under *Kelo*, the deferential standard the Court of Appeals used to evaluate the evidence of pretext here is the correct legal standard. Contrary to Respondent's unfounded argument that this Petition presents only a factbound determination, whether a taking serves a public purpose or is instead pretext, and concomitantly, the relevant standard of review to assess such a claim, is indisputably a question of law. *See City of Cincinnati v. Vester*, 281 U.S. 439, 446 (1930). This Court's answer will dispel the confusion among courts nationwide, and clarify for property owners a question of constitutional dimension. Accordingly,

2. Respondent's Brief at 18.

3. Petitioners' Petition for a Writ of Certiorari ("Petition") at 22-24.

Petitioners ask this Court to grant *certiorari* and set forth the applicable legal standard in these eminent domain cases, and to hold that the Court of Appeals erred in not applying that legal standard in the face of clear allegations of pretext and favoritism.

A. This Court Should Address the Serious Conflict that Exists Among Lower Courts

Although Respondent acknowledges the existence of a conflict, it attempts to distract this Court by arguing that the conflict is "limited in nature" and would benefit from "further 'percolation.'"[4] This argument is disingenuous at best. Respondent does not, nor could it, explain the inherent contradiction between the Second Circuit's decision in *Goldstein v. Pataki*, 516 F.3d 50 (2d Cir. 2008), which suggested that the "searching review" contemplated by Justice Kennedy should be limited only to takings for economic development,[5] and other courts that have expressly adopted *Kelo*'s analysis for takings that allege classic public purposes.[6] Neither does Respondent try to square the Court of Appeals' refusal to discuss *Kelo* with the approaches of the other courts below.

Instead, Respondent confuses the issue by insisting that the Court of Appeals made a purely factbound determination. This is a dangerously flawed argument. Significantly, the central issue before this Court is the

4. Respondent's Brief at 28.

5. Petition at 27-28.

6. Petition at 28-31.

appropriate *level* of review when assessing if a taking for a private beneficiary is pretextual – whether "searching" or a "skeptical eye," as opposed to merely deferential – but Respondent evades that question by insisting, without support, that the Court of Appeals had examined the pretext claim here. The Appellate Division plurality noted that any discussion of the constitutionality of the ESDC's "scheme" must begin with analysis under *Kelo* and under the heading "THE KELO DOCTRINE MANDATES" outlined how the ESDC actions fell short of such mandates.[7] The Court of Appeals ignored this issue entirely, and its cursory review of the record indicates that it had decided, erroneously, that *Kelo* did not apply.[8] The difference between these decisions is not factual evaluation, but a disagreement on which legal standard to apply.

Respondent's argument that this Court's review would be immaterial thus rings hollow. Should this Court find that *Kelo* applied to this case, and that such one-to-one transfers of property warranted greater than deferential review, the Court of Appeals here would have committed reversible error. In fact, any examination of Petitioners' pretext claim by the Court of Appeals was conclusory and superficial. For example, Respondent emphasizes the only two paragraphs in the Court of Appeals opinion that remotely address pretext. Instead of a searching review on the merits, the Court of Appeals summarily dismissed Petitioners' evidence of pretext and bad faith, and accepted Respondent's assertions at face value, which it then parroted in its opinion.

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7. *See* Petition at 48a.

8. *See also* Petition at 16 n.20.

Neither does Respondent attempt to square the Court of Appeals' refusal to discuss *Kelo* in its opinion with the other cases below. Contrast the treatment of the pretext evidence here with that of *Franco v. Nat'l Capital Revitalization Corp.*, which noted that under *Kelo*, "there may be situations where a court should not take at face value what the legislature has said." 930 A.2d 160, 169 (D.C. App. 2008). And while *Franco* did suggest that prior identification of the private beneficiaries would not categorically condemn a taking, that factor is but one facet in this case that, taken together, demonstrate the pretext here.[9] Indeed, *Franco* indicated that the factors identified by Justice Kennedy "may accurately predict what the Court will hold when the record before it does not resolve the pretext issue." *Id.* at 169 n. 9. Similarly, Respondent does not dispute the Hawaii Supreme Court's holding that courts are "obligated to consider any and all evidence . . . indicating that the private benefit . . . predominated." *County of Hawai'i v. C&J Coupe Family Ltd. P'ship*, 198 P.3d 615, 650 (Haw. 2008).[10] This requirement clashes with the

9. Petition at 22-24.

10. The subsequent history of *County of Hawai'i* does not disturb this conclusion. *See County of Hawai'i v. C&J Coupe Family*, No. 29887, 2010 Haw. App. LEXIS 661 (Haw. Nov. 10, 2010). The Hawai'i Supreme Court affirmed the lower court's conclusion on remand that there was no pretext, because among other things, there had been a legislative resolution for the condemnation, and testimony from the Director of Public Works established prior longstanding general plans consistent with the condemnation. *See id.* at *40-41, *55-56. In doing so, the Hawai'i Supreme Court reiterated its original holding, premised on *Kelo*, that "a court may 'look behind an eminent domain plaintiff's asserted public purpose' to determine

(Cont'd)

Court of Appeals' casual dismissal, without any substantive discussion, of Petitioners' pretext argument.

Respondent also attempts to distinguish *Middletown Twp. v. Lands of Stone*, 595 Pa. 607 (Penn. 2007), but the Pennsylvania Supreme Court has recently extended its holding beyond purely pretextual purposes, where the condemnation, in Respondent's words, "was not intended to accomplish its stated objective."[11] After this Petition was filed, the Pennsylvania Supreme Court held in *In re Opening a Private Rd. ex rel. O'Reilly*, 5 A.3d 246, 2010 Pa. LEXIS 2272 (Penn. Sept. 30, 2010), that a condemnation for the construction of a private road to connect landlocked property to a public road effected a taking. Relying on both *Kelo* and *Lands of Stone*, the Pennsylvania Supreme Court remanded for further proceedings, because the lower court's reasoning that the construction of a private road furthered the public purpose of making landlocked tracts of property accessible, "speaks merely to the presence of some public benefit," and had made "no attempt to confirm that the public is the primary and paramount beneficiary." *Id.* at *31-32. In so holding, the Pennsylvania Supreme Court explicitly rejected the dissenting justices' position, because they had failed to

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(Cont'd)

whether a purpose is pretextual." *Id.* at *31 (quoting *County of Hawai'i*, 198 P.3d at 647). This latest iteration of *County of Hawai'i* indicates what factors will defeat an allegation of pretext, factors which do not exist in this case.

11. Respondent's Brief at 31.

consider "the internal limitations of the *Kelo* decision" on the use of eminent domain. *Id.* at *34.

Respondent's attempt to minimize the actual conflict among these cases is unavailing. The confusion below on how claims of pretextual takings should be evaluated deserves this Court's attention, and this case is an appropriate vehicle to explore the contours of the "internal limitations of the *Kelo* decision." *Id.*

B. By Applying the Incorrect Standard of Review, The Court of Appeals Obscured Substantial Evidence of Pretext and Favoritism

Respondent is similarly mistaken when it claims that the Court of Appeals decision is consistent with Kelo.[12] By ignoring *Kelo*, the Court of Appeals refused to acknowledge the overwhelming record evidence of favoritism and pretext, the same facts that prompted the Appellate Division to undertake the searching review called for in *Kelo*. The difference between the treatment of the facts by the Court of Appeals and the Appellate Division is night and day, and highlights the importance of the need for this Court's review. Respondent's misrepresentation of the critical facts that demonstrate significant favoritism and pretext in its Brief in Opposition, only underlines the need for this Court to articulate the appropriate standard of review for such claims.

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12. Respondent's Brief at 22.

To say that the Court of Appeals determined the case on the merits begs the question presented by this case. The finding that there was blight, or that because the project benefited Columbia, an educational institution, it met the standard for a civic purpose, or that other alternatives were considered are findings that clearly will vary depending on the standard of review to be applied.

Thus when the Court of Appeals found that the ESDC finding that the area was blighted was justified it clearly accepted the "expert" reports relied on by the agency. Yet significant questions were raised below that their conclusions lacked basis and that they were seriously flawed in their analysis.[13] Other questions were raised as to whether prior to consideration of the Columbia plan, the area had been previously found to be blighted.[14]

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13. *See Kaur v. NYS Urban Development Corporation*, Petition at 60a-63a. The plurality of the Appellate Division found the studies so biased that it concluded "the blight designation in the present case is mere sophistry." *Id.* at 48a.

14. *See Kaur v. NYS Urban Development Corporation*, Petition at 58a. Respondent persisted in trying to introduce with its pleadings an excerpt from a 1957 study, but the plurality of the Appellate Division refused to consider this document, as it is extraneous to the record, *id.* at 58a-59a, and the "residential" areas it described as blighted do not identify the Manhattanville industrial district. The Court of Appeals, by contrast, cited a 2004 draft study that was abandoned, lacked any factual basis for its assessment of building conditions, misapplied blight criteria, and was explicitly rejected by ESDC as inadequate to provide for a basis for a finding of blight. See December 15, 2004 e-mail of Maria Cassidy, RA-537.

Certainly, there are sufficient questions raised in the record below as to whether the finding of blight was merely a means to justify a pre-ordained result – the adoption of the Columbia plan – or a true finding of "a substandard and unsanitary area" to warrant more than mere deference to the ESDC. A more searching or heightened inquiry was warranted. The Appellate Division plurality applied such a standard relying on *Kelo*; the Court of Appeals, ignoring *Kelo*, did not.

So too with regard to the issue of educational purpose and civic project the same rationale applies. The record below shows that such a designation was an after thought and not the dominant purpose for the adoption of the Columbia plan. While the Appellate Division plurality found no basis for a civic project, the Court of Appeals, ignoring *Kelo* found that the mere invocation of an educational purpose was enough to grant Columbia eminent domain. The distinction here is further highlighted by the recent case *In re Opening a Private Rd. ex rel. O'Reilly*, decided by the Pennsylvania Supreme Court. Relying on *Kelo*, the Pennsylvania Supreme Court rejected a finding of public purpose without a confirmation that the public is "the primary and paramount beneficiary."

The Columbia plan could not withstand such scrutiny. Merely citing Columbia's self defined need for 17 acres to expand its campus does not equate with a public purpose. Under *Kelo* a more searching inquiry is required and this the Court of Appeals did not do.

Finally it should be noted that in a transparent effort to avoid *Kelo* both the Court of Appeals and Respondent

in its brief contend that the ESDC considered other alternative plans for the property. Citing to an Environmental Impact Statement prepared several years after the project was designed to the specification of a sole developer, Columbia, could not withstand the rigors of *Kelo*.[15] No application of the procedural safeguards contemplated in *Kelo* would accept such clear favoritism. As the Appellate Division plurality found and the record below documents, Columbia was the pre-selected developer.

In sum, Respondent's arguments that this case does not warrant review is not persuasive. We submit that the record below, the decision of the lower court and the utter refusal of the Court of Appeals to consider *Kelo* as controlling, together with the conceded confusion among the courts as to the scope and import of *Kelo* make this case eminently appropriate for granting certiorari.

II. Petitioners' Due Process Claim

Finally, Respondents argue that "review is unwarranted in light of the Court of Appeals' determination that the internal ESDC documents at issue in Petitioners' FOIL proceeding were not material and that Petitioners were not prejudiced by not obtaining them."[16] Footnote 69 of Repondent's Brief

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15. Petition at 8a; Respondent's Brief at 8. Respondent's consideration of "alternatives" bears no resemblance to the kind of consideration of alternative plans and beneficiaries that Justice Kennedy approved in *Kelo*.

16. Respondent's brief at 36.

makes clear that the above statement only refers to one FOIL proceeding which the Court of Appeals heard (*West Harlem Business Group v. Empire State Dev. Corp.*, 13 N.Y. 3d 882 (2009)) and involved only seven documents.[17] There are numerous FOIL proceedings, however,[18] and even today, two years later, a FOIL proceeding that involves some 252 records remains pending in New York State Supreme Court. It would be impossible for Petitioners to demonstrate materiality and/or prejudice to records that they do not have access to. Under such circumstances, it is the quintessential Catch-22 to demand that Petitioners demonstrate prejudice.[19]

Respondent also greatly minimizes the importance of the due process claim made here. Because procedural protections within the context of eminent domain vary across the country, this case provides a platform for this Court to establish the minimum due process rights that a property owner is entitled to in eminent domain proceedings, in both New York and the rest of the nation.

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17. *Id.*

18. *See* Petition, Footnote 25, page 36.

19. Courts have recognized this Catch-22 in a similar situation, holding that a party need not demonstrate that destroyed or withheld evidence is sufficiently "relevant" to its claim or defense in order to obtain an adverse jury instruction. *See Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99, 109 (2d Cir. 2002) ("Courts must take care not to hold [ ]the prejudiced party to too strict a standard of proof regarding the likely contents of the destroyed [or unavailable] evidence because doing so would subvert the ... purpose of the adverse inference, and would allow parties who have...destroyed evidence to profit from that destruction") [citations omitted].

CONCLUSION

This case raises substantial questions of national importance concerning fundamental constitutional rights that need guidance from this Court. We respectfully urge this Court to grant review of this matter.

Dated: New York, New York
November 22, 2010

Respectfully submitted,

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No. 10-402

FILED

OCT 25 2010

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In The

Supreme Court of the United States

TUCK-IT-AWAY, INC., et al.,

Petitioners,

v.

NEW YORK STATE URBAN DEVELOPMENT CORPORATION, d/b/a EMPIRE STATE DEVELOPMENT CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of New York

BRIEF OF *AMICI CURIAE* THE INSTITUTE FOR JUSTICE, THE BECKET FUND FOR RELIGIOUS LIBERTY, AND THE CATO INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Does the Public Use Clause of the Fifth Amendment permit condemnations where the official stated purpose of alleviating "blight" is a pretext for the true purpose of benefiting a private party?

2. Does the Public Use Clause of the Fifth Amendment permit the use of eminent domain to take property for transfer to a known private entity that will get the vast majority of the benefit from the taking?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

INTEREST OF THE *AMICI CURIAE* 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 3

I. STATE SUPREME COURTS AND LOWER FEDERAL COURTS DISAGREE OVER THE DEFINITION OF A PRETEXTUAL TAKING 5

A. State Supreme Courts and Federal Courts Emphasizing the Actual Intentions of Condemning Authorities 6

B. Courts Emphasizing the Magnitude and Distribution of Expected Benefits 8

C. Courts Focusing on the Extent of the Pre-Condemnation Planning Process ... 9

D. The Presence of a Known Private Beneficiary 10

E. Courts that Virtually Define Pretextual Takings Out of Existence 10

1. The Atlantic Yards Cases 11

2. The New York Court of Appeals ignored virtually every possible indicator of pretext in the present case 12

TABLE OF CONTENTS – Continued

Page

a. Evidence of pretextual motive ... 12

b. Evidence that Columbia will be the primary beneficiary of the takings 16

c. Lack of careful, objective planning 17

d. There is no dispute that Columbia was an identifiable private beneficiary of these takings 17

II. THE COURT MUST ESTABLISH CLEAR STANDARDS FOR PRETEXTUAL TAKINGS IN ORDER TO PROTECT THE RIGHTS OF NUMEROUS PROPERTY OWNERS AGAINST CONDEMNATIONS DRIVEN BY FAVORITISM 19

A. Blight and Economic-Development Takings Threaten Numerous Property Owners 19

B. The Risk of Pretextual Condemnations is Greater in States that Have a Virtually Unlimited Definition of Blight..... 21

C. New York Law Leaves Its Citizens Especially Vulnerable to Eminent Domain Abuse 22

1. New York's definition of "Blight" is extraordinarily broad 23

TABLE OF CONTENTS – Continued

Page

2. New York's unique eminent domain procedures leave the state's property owners particularly vulnerable to pretextual takings 24

III. THE PRESENT CASE IS AN EXCELLENT VEHICLE FOR THIS COURT TO DEFINE THE MEANING OF PRETEXTUAL TAKINGS 26

CONCLUSION 28

TABLE OF AUTHORITIES

Page

CASES

99 Cents Only Store v. Lancaster Redev. Agency, 237 F. Supp. 2d 1123 (C.D. Cal. 2001) 7

Aaron v. Target Corp., 269 F. Supp. 2d 1162 (E.D. Mo. 2003), *rev'd on other grounds*, 357 7F.3d 768 (8th Cir. 2004) 7

Armendariz v. Penman, 75 F.3d 1311 (9th Cir. 1996) 7

Brody v. Village of Port Chester, 345 F.3d 103 (2d Cir. 2003) 24

Cottonwood Christian Ctr. v. Cypress Redev. Agency, 218 F. Supp. 2d 1203 (C.D. Cal. 2002) 7

County of Hawaii v. C&J Coupe Family Ltd. Partnership, 198 P.3d 615 (Haw. 2008) 6

County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004) 21

Daniels v. Area Plan Comm'n, 306 F.3d 445 (7th Cir. 2002) 9

Franco v. Nat'l Capital Revitalization Corp., 930 A.2d 160 (D.C. 2007) 8

Goldstein v. Pataki, 488 F. Supp. 2d 254 (EDNY 2007) 3

Goldstein v. Pataki, 516 F.3d 50 (2d Cir. 2008) 10, 11, 12

Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984) 3, 27

TABLE OF AUTHORITIES – Continued

Page

In re Goldstein v. N. Y. State Urban Dev. Corp., 921 N.E.2d 164 (N.Y. 2009) 11, 12, 23

In re O'Reilly, No. 10 WAP 2009, 2010 WL 3810005 (Pa. Sept. 30, 2010) 6

Kaur v. New York State Urban Dev. Corp., 892 N.Y.S.2d 8 (N.Y. App. Div. 2009), *rev'd*, 15 N.Y.3d 235 (N.Y. 2010) ..... *passim*

Kelo v. City of New London, 545 U.S. 469 (2005) ..... *passim*

Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) 26

Mayor & City Council of Baltimore v. Valsamaki, 916 A.2d 324 (Md. 2007) 9

MHC Financing Ltd. Partnership v. City of San Rafael, No. C 00-3785VRW, 2006 WL 3507937 (N.D. Cal. Dec. 5, 2006) 8

Middletown Twp. v. Lands of Stone, 939 A.2d 331 (Pa. 2007) 6, 9

Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981) 20

Rhode Island Economic Dev. Corp. v. The Parking Company, 892 A.2d 87 (R.I. 2006) 9

Three Affiliated Tribes v. World Engineering, P.C., 467 U.S. 150 (1984) 18

Uptown Holdings, LLC v. City of New York, 2010 WL 3958687 (N.Y. App. Div., 1st Dept., Oct. 12, 2010) 18, 23

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const., amend. V 2, 3

U.S. Const., amend. XIV 2

CODES, REGULATIONS, RULES AND STATUTES

Cal. Health & Safety Code § 33368 25

Cal. Code Civ. Proc. §§ 1250.350-1250.370 25

N.Y. EDPL § 202 24

N.Y. EDPL § 207 24

N.Y. EDPL § 208 24

Sup. Ct. R. 10(b) 5

OTHER PUBLICATIONS

Brief for Becket Fund for Religious Liberty as Amicus Curiae in support of Petitioners, *Kelo v. City of New London*, 545 U.S. 469 (2004) (No. 04-108), 2004 WL 2787141 20

Brief for the NAACP et al. as Amici Curiae Supporting Petitioners, *Kelo v. City of New London*, 545 U.S. 469 (2004) (No. 04-108) 20

Dick M. Carpenter II & John K. Ross, *Victimizing the Vulnerable* (Institute for Justice 2007), *available at* http://www.ij.org/images/pdf_folder/other_pubs/Victimizing_the_Vulnerable.pdf 4, 20

TABLE OF AUTHORITIES – Continued

Page

Daniel B. Kelly, *Pretextual Takings: Of Private Developers, Local Governments, and Impermissible Favoritism,* 17 SUP. CT. ECON. REV. 173 (2009) 4

Damon Root, *College Cheats: Columbia Blighted Own Hood*, N.Y. Post, Feb. 16, 2009, *available at* http://www.nypost.com/p/news/opinion/opedcolumnists/item_oZsTv770SurlHI5f5BJlQO;jsessionid=DD25B89035A1B3D03970A76560585183 14

Ilya Somin, *Blight Sweet Blight,* LEGAL TIMES, Aug. 14, 2006 21

Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings after* Kelo, 15 SUP. CT. ECON. REV. 183 (2007) 19, 20

Ilya Somin, *Overcoming Poletown:* County of Wayne v. Hathcock, *Economic Development Takings, and the Future of Public Use*, 2004 MICH. ST. L. REV. 1005 (2004) 20

Ilya Somin, *The Judicial Reaction to Kelo,* ___ ALB. GOVT. L. REV. ___ (forthcoming 2011) 4

Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100 (2009) 22

INTEREST OF THE *AMICI CURIAE*[1]

The Institute for Justice ("IJ") is a nonprofit, public-interest law center committed to defending the essential foundations of a free society and securing the constitutional protections necessary to ensure individual liberty. A central pillar of IJ's mission is to protect property rights, both because an individual's control over his own property is a tenet of personal liberty and because property rights are inextricably linked to all other civil rights.

IJ is the nation's leading legal advocate against eminent-domain abuse. IJ represented the property owners in *Kelo v. City of New London*, 545 U.S. 469 (2005), and in many other federal and state eminent-domain cases throughout the country. This case presents constitutional issues at the core of property-rights protection in the wake of *Kelo*.

The Cato Institute was established in 1977 as a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward

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[1] In accordance with Supreme Court Rule 37, counsel for all parties received notice at least 10 days before the due date of *amici's* intention to file this brief and have consented to the filing. No party's counsel authored this brief in whole or in part and no persons other than *amici* or their counsel made a monetary contribution to its preparation or submission.

those ends, Cato publishes books and studies, conducts conferences, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs, including in various cases concerning property rights. This case is of central concern to Cato because it implicates the safeguards the Fifth and Fourteenth Amendments provide to prevent eminent-domain abuse.

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions. The Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jains, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in litigation across the country and around the world. It frequently represents houses of worship whose religious freedom has been violated under the guise of land use regulation, including eminent domain.

The Becket Fund submits this brief because it is concerned that the New York Court of Appeals' decision would, if left uncorrected, add to the already potent threat that eminent domain poses to the religious liberty of Americans of all faith traditions.

STATEMENT OF THE CASE

Amici incorporate by reference the description of the facts in the petition for writ of certiorari. Pet. at 5-16.

REASONS FOR GRANTING THE PETITION

This case presents an opportunity for this Court to clarify the definition of a "pretextual taking" under the Public Use Clause of the Fifth Amendment. In *Kelo v. City of New London*, 545 U.S. 469, 479-85 (2005), this Court ruled that "economic development" is a public purpose justifying the use of eminent domain. But the Court also emphasized that government may not "take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." *Id.* at 478. In his concurrence, Justice Kennedy noted that a taking characterized by "impermissible favoritism" would be unconstitutional if the government cannot prove that it served a non-pretextual public purpose. *Id.* at 491 (Kennedy, J., concurring). More generally, although public purpose is defined broadly, this "Court's cases have repeatedly stated that one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (internal citation omitted).

Unfortunately, *Kelo* provided only limited guidance on what counts as a pretextual taking. *See, e.g.*, *Goldstein v. Pataki*, 488 F. Supp. 2d 254, 288 (EDNY 2007), *aff'd*, 516 F.3d 50 (2d Cir. 2008) (noting that "[a]lthough *Kelo* held that merely pretextual purposes do not satisfy the public use requirement, the *Kelo* majority did not define the term 'mere pretext'").

As a result, lower courts have applied different standards.[2] Several state supreme courts look to the motives of the condemnor. Others focus on whether the new private owner captures most of the benefits of the condemnation. A third group focuses on the extent of the planning process preceding the taking. Finally, the New York Court of Appeals and the United States Court of Appeals for the Second Circuit essentially ignore all these considerations. They define pretext so narrowly that even the most blatant favoritism will escape judicial scrutiny. This confusion calls out for resolution by this Court.

The Court should also address the question of pretextual takings because it is substantively important. Since World War II, hundreds of thousands of Americans have been forcibly displaced from their homes or businesses as a result of economic-development and blight condemnations. Most of those displaced are poor or ethnic minorities with little political influence.[3] Judicial enforcement of constitutional property rights is often their only hope for protection against pretextual takings.

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[2] For detailed discussions of the widely divergent post-*Kelo* case law on pretext, see Kelly, *Pretextual Takings*, and Ilya Somin, *The Judicial Reaction to Kelo*, ___ ALB. GOVT. L. REV. ___ (forthcoming 2011), at 22-30.

[3] *See* Dick M. Carpenter II & John K. Ross, *Victimizing the Vulnerable* (Institute for Justice 2007), *available at* http://www.ij.org/images/pdf_folder/other_pubs/Victimizing_the_Vulnerable.pdf.

The present case is a particularly flagrant example of the abuse of eminent domain. It includes all four factors that this Court and lower courts have identified as indications of pretext: evidence of pretextual intent, benefits that flow predominantly to a private party, haphazard planning, and a readily identifiable private beneficiary. It therefore gives the Court an excellent opportunity to clarify the importance of each factor in adjudicating pretextual takings.

I. STATE SUPREME COURTS AND LOWER FEDERAL COURTS DISAGREE OVER THE DEFINITION OF A PRETEXTUAL TAKING.

In deciding whether to grant *certiorari*, this Court gives preference to cases where "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." Sup. Ct. R. 10(b). There are few more confused splits than the division over pretextual takings after *Kelo*.

Two state supreme courts interpret *Kelo* as requiring a focus on the actual intentions of the condemning authority. The District of Columbia Court of Appeals focuses instead on the magnitude of the expected public benefits from the taking. Two other high courts emphasize the extent of the planning process behind a condemnation. Finally, the

Second Circuit, and the New York Court of Appeals in the present case, define pretextual takings so narrowly that it becomes virtually impossible to invalidate even the most abusive condemnations.

A. State Supreme Courts and Federal Courts Emphasizing the Actual Intentions of Condemning Authorities.

Two state supreme courts interpret *Kelo*'s pretextual-taking inquiry as focusing primarily on the actual intentions of condemning authorities and the plausibility of the condemning authority's asserted purpose. In *Middletown Township v. Lands of Stone*, the Pennsylvania Supreme Court interpreted *Kelo* as requiring it to examine "the real or fundamental purpose behind a taking ... the true purpose must primarily benefit the public." 939 A.2d 331, 337 (Pa. 2007); *see also In re O'Reilly,* No. 10 WAP 2009, 2010 WL 3810005 at *2 (Pa. Sept. 30, 2010) (quoting *Lands of Stone*, 939 A.2d at 337). *O'Reilly* also noted the crucial factor: "the public must be the primary and paramount beneficiary of the taking." *Id.* at *10.

The Hawaii Supreme Court also focuses on motive. It held in *County of Hawaii v. C&J Coupe Family Ltd. Partnership* that *Kelo* requires courts to look for "the actual purpose" of a taking to determine whether the official rationale was "a mere pretext." *See* 198 P.3d 615, 647-49 (Haw. 2008). However, Hawaii and Pennsylvania differ in that the latter

relies far more on the distribution of benefits to determine purpose.

Several pre-*Kelo* federal decisions take a similar approach. *See Armendariz v. Penman*, 75 F.3d 1311, 1321 (9th Cir. 1996) (en banc) (invalidating a taking because the official rationale of blight alleviation was a pretext for "a scheme ... to deprive the plaintiffs of their property ... so a shopping-center developer could buy [it] at a lower price"); *Aaron v. Target Corp.*, 269 F. Supp. 2d 1162, 1174-76 (E.D. Mo. 2003), *rev'd on other grounds*, 357 F.3d 768 (8th Cir. 2004) (holding that a property owner was likely to prevail on a claim that a taking ostensibly to alleviate blight was actually intended to serve the interests of the Target Corporation); *Cottonwood Christian Ctr. v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203, 1229 (C.D. Cal. 2002) ("Courts must look beyond the government's purported public use to determine whether that is the genuine reason or if it is merely pretext."); *99 Cents Only Store v. Lancaster Redev. Agency*, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001) ("No judicial deference is required ... where the ostensible public use is demonstrably pretextual").[4]

A lower court in the present case also focused on evidence showing that the condemnation's actual motive was to benefit Columbia. *See Kaur v. New York State Urban Dev. Corp.*, 892 N.Y.S.2d 8,

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[4] *See also Kelo*, 545 U.S. at 487 n.17 (favorably citing *99 Cents Only*).

18-20 (N.Y. App. Div. 2009), *rev'd* 15 N.Y.3d 235 (N.Y. 2010).

B. Courts Emphasizing the Magnitude and Distribution of Expected Benefits.

In contrast to the Hawaii and Pennsylvania supreme courts, the Court of Appeals of the District of Columbia emphasizes the magnitude of the public benefits of the taking relative to the private ones: "If the property is being transferred to another private party, and the benefits to the public are only 'incidental' or 'pretextual,' a 'pretext' defense may well succeed." *Franco v. Nat'l Capital Revitalization Corp.*, 930 A.2d 160, 173-74 (D.C. 2007). The court remanded *Franco* with instructions to "focus primarily on the benefits the public hopes to realize from the proposed taking." *Id.* at 173. This approach builds on Justice Kennedy's concurring opinion in *Kelo*, which suggested that a taking might be invalidated if it has "only incidental or pretextual public benefits." *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring).

In *MHC Financing Ltd. Partnership v. City of San Rafael,* the Northern District of California also interpreted *Kelo* as requiring "'careful and extensive inquiry into whether, in fact, the development plan is of primary benefit to the developer ... [and] only incidental benefit to the City.'" No. C 00-3785VRW, 2006 WL 3507937, at *14 (N.D. Cal. Dec. 5, 2006) (quoting *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring)).

A pre-*Kelo* Seventh Circuit case also emphasizes the distribution of the benefits of a taking. *See Daniels v. Area Plan Comm'n,* 306 F.3d 445, 456-66 (7th Cir. 2002) (holding that the takings' true purpose was "to confer a private benefit" because "any speculative public benefit would be incidental at best.")[5]

C. Courts Focusing on the Extent of the Pre-Condemnation Planning Process.

The Maryland, Pennsylvania, and Rhode Island supreme courts have relied on the absence of extensive planning to indicate a pretextual taking. *See Middletown*, 939 A.2d at 338 (concluding that "evidence of a well-developed plan of proper scope is significant proof that an authorized purpose truly motivates a taking"); *Mayor & City Council of Balt. v. Valsamaki*, 916 A.2d 324, 352-53 (Md. 2007) (noting absence of clear plan for the use of condemned property, and contrasting with *Kelo*); *R. I. Econ. Dev. Corp. v. The Parking Company,* 892 A.2d 87 (R.I. 2006) (emphasizing difference between condemnor's approach and the "exhaustive preparatory efforts that preceded the takings in *Kelo*"). These decisions

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[5] While *Daniels* differs slightly from the present case because the alleged public purpose claimed by the government was not pursuant to a specific "legislative determination," the court's analysis also focused on the importance of the distribution of benefits from a taking as an independent factor weighing against the government. *Id.* at 465-66.

build on *Kelo*'s emphasis on the presence of an "integrated development plan" behind the takings upheld in that case. *Kelo,* 545 U.S. at 488.

D. The Presence of a Known Private Beneficiary.

Both the majority and concurrence in *Kelo* note that there is a greater risk of a pretextual taking when the taking's private beneficiary is known in advance. *See Kelo,* 545 U.S. at 478 n. 6; *id.* at 491-92 (Kennedy, J., concurring). Most lower courts either ignore this aspect of *Kelo's* analysis or, in the case of the Second Circuit, give it little weight. *See Goldstein v. Pataki*, 516 F.3d 50, 55-56 (2d Cir. 2008) (dismissing the significance of the "acknowledged fact that [a private developer] was the impetus behind the project ... and that it was his plan for the Project that [was] ... eventually adopted without significant modification"). The absence of this factor from lower-court analyses further indicates confusion about *Kelo*'s meaning.

E. Courts That Virtually Define Pretextual Takings Out of Existence.

The Second Circuit and the New York Court of Appeals have defined pretextual takings so narrowly that it is virtually impossible to challenge a condemnation on that basis. As discussed above, that conclusion places them at odds with the Seventh and Ninth Circuits and the highest courts of the District of

Columbia, Hawaii, Maryland, Pennsylvania, and Rhode Island.

1. The Atlantic Yards Cases.

In *Goldstein v. Pataki*, 516 F.3d 50 (2d Cir. 2008), the Second Circuit held that so long as a taking is "rationally related to a classic public use," it is impermissible to "give close scrutiny to the mechanics of a taking ... to gauge the purity of the motives of various government officials who approved it." *Id.* at 62.

The Second Circuit also rejected claims that the takings should be invalidated because most benefits would flow to developer Bruce Ratner or because any benefits to the community would be "dwarf[ed]" by the project's costs. *Id.* at 58. Similarly, the court rejected the idea that any significant scrutiny was required because Ratner was the originator of the project and his status as the main private beneficiary of the takings was known from the start. *Id.* at 55-56.

Finally, both the Second Circuit and a later decision by the New York Court of Appeals upholding the same takings failed to seriously consider evidence that the planning process was deliberately skewed to benefit Ratner. As Judge Robert Smith pointed out in his dissenting opinion in the state case, the original rationale for the condemnation was "economic development—job creation and the bringing of a professional basketball team to Brooklyn." *In re Goldstein v. N. Y. State Urban Dev. Corp.*, 921 N.E.2d 164,

189 (N.Y. 2009) (Smith, J., dissenting). Apparently, "nothing was said about 'blight' by the sponsors of the project until 2005," when the ESDC realized that a blight determination might be legally necessary. *Id.*

2. The New York Court of Appeals Ignored Virtually Every Possible Indicator of Pretext in the Present Case.

The Court of Appeals' decision in the present case gives free rein to pretextual takings just as much as the opinions in the *Goldstein* cases. It ignores evidence of pretextual motive, evidence that Columbia would reap most of the condemnation's benefits, evidence of inadequate planning, and the fact that Columbia's identity as the main beneficiary of the taking was known from the beginning. Amazingly, the court's decision fails to cite *Kelo* at all, despite a lower court's extensive reliance on *Kelo's* pretext analysis to invalidate these takings. *See Kaur v. N. Y. State Urban Dev. Corp.*, 892 N.Y.S.2d 8, 18-20 (N.Y. App. Div. 2009), *rev'd*, 15 N.Y.3d 235 (N.Y. 2010).

a. Evidence of Pretextual Motive.

The *Kaur* takings arose from Columbia University's effort to acquire property for expansion in Manhattanville. *Kaur*, 15 N.Y.3d at 244-47. The official reason for the condemnation was the need to alleviate "blight." But the Court of Appeals failed to consider extensive evidence showing that the "blight"

determination was deliberately rigged for the purpose of transferring the condemned property to Columbia.

These takings had previously been invalidated by New York's Appellate Division, which found "no evidence whatsoever that Manhattanville was blighted prior to Columbia gaining control over the vast majority of property therein." *Kaur,* 892 N.Y.S.2d at 20. The ESDC, the condemning agency, only ordered a blight study after Columbia had already acquired most of the property in the area and "gained control over the very properties that would form the basis for a subsequent blight study." *Id.* at 21. When Columbia presented the agency with a plan to use eminent domain to acquire the remaining property and use it for Columbia's "sole benefit," a blight study was commissioned from AKRF, a firm simultaneously employed by Columbia on another project. *Id.* at 20-21.

AKRF was instructed by the ESDC to use a methodology "biased in Columbia's favor," which established blight through the presence of minor defects like "unpainted block walls or loose awning supports."[6] *Kaur,* 892 N.Y.S.2d at 17. Later, another firm was hired to conduct an independent blight study, but it was required to use the same flawed methodology. *Id.* at 17-18. As the Appellate Division concluded, "[v]irtually every neighborhood in the five

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[6] For more details on the biases and flaws in the blight study, see Pet. at 9-11.

boroughs will yield similar instances of disrepair that can be captured in close-up technicolor." *Id.* at 17. Moreover, most of the "blight" AKRF found was located on property owned by Columbia, and was possibly allowed to develop in order to justify a blight finding. *See* Root, *College Cheats* (noting that Columbia already owned 76% of the land in the area at the time of the study and that "the university refused to perform basic and necessary repairs—thereby ... manufacturing the ugly conditions that later advanced the school's real-estate interests").

The Appellate division concluded that the area could not be considered blighted, and also ruled that the blight findings were an unconstitutional "pretextual" taking under *Kelo*. *Kaur,* 892 N.Y.S.2d at 18-20.

In reversing the Appellate Division, the Court of Appeals refused to consider most of the evidence that the study deliberately used biased methodology, noting only that AKRF's objectivity was not compromised merely "because Columbia had previously engaged AKRF" to produce its development plan for the area. *Kaur*, 15 N.Y.3d at 255. The court also noted that AKRF's findings were confirmed by a study conducted by another firm. *Id.* But it did not consider the relevance of the fact that the other firm was also required to use the same biased methodology as AKRF.

The Court of Appeals also noted that a third firm, Urbitran, had conducted a study finding "blight" in

the area prior to AKRF's, thereby attempting to negate the Appellate Division's finding that there was no evidence of blight prior to the acquisition of most of the area by Columbia. *Id.* at 257. The Court of Appeals, however, did not dispute the Division's finding that the ESDC had only commissioned the AKRF study because ESDC staff doubted the legal adequacy of the Urbitran findings.[7] *Kaur*, 892 N.Y.S.2d at 12-13, 21.

The Appellate Division found further evidence of improper motive in the ESDC's behavior with regard to Freedom of Information Law requests. *Kaur*, 892 N.Y.S.2d at 17-18. The ESDC improperly withheld documents from the owners and then insisted on closing the record of the proceedings before it handed over the documents. The ESDC thus deprived the owners of vital information needed to challenge the project at the only time such evidence could be used. The failure to release the documents at the critical time not only amounted to a due process violation—it indicated the extent to which the ESDC was willing to take any action in order to approve the project. *Kaur*, 892 N.Y.S.2d at 17-18 (plurality), 19-23 (Richter, J., concurring and discussing due-process violations at length). The Court of Appeals simply ignored this significant constitutional issue, and the evidence of pretextual motive it represents.

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[7] The Court of Appeals incorrectly stated that the Appellate Division had "ignored" the Urbitran study. *Kaur*, 15 N.Y.3d at 257.

b. Evidence That Columbia Will Be the Primary Beneficiary of the Takings.

The Court of Appeals also failed to seriously consider evidence that Columbia University would be the primary beneficiary of the takings. These takings were conducted pursuant to Columbia's preexisting expansion plans. *See Kaur*, 892 N.Y.S.2d at 21-22; Pet. at 23-24. As the Appellate Division pointed out, Columbia will be able to use the condemned property for its "sole benefit." *Kaur*, 892 N.Y.S.2d at 21.

The conclusion that the takings will primarily benefit Columbia is reinforced by the fact that there is little or no evidence that the condemned area was actually blighted. As the Appellate Division pointed out, "[t]he 2002 West Harlem Master Plan stated that not only was Harlem experiencing a renaissance of economic development, but that the area had great development potential that could easily be realized through rezoning." *Kaur*, 892 N.Y.S.2d at 19. Since blight alleviation was the stated purpose behind the taking, the absence of any significant blight strongly suggests that there will be minimal public benefit. By contrast, the benefits to Columbia are likely to be extensive, since it has long sought to acquire the properties in question. Pet. at 5.

c. Lack of Careful, Objective Planning.

In *Kelo,* the Supreme Court emphasized that the New London condemnations were the result of a "carefully considered development plan." *Kelo*, 545 U.S. at 478. In this case, by contrast, the plan was concocted by Columbia University—the very private interest that stood to benefit from the condemnations. *See* §§ I.E.2.a-b, *supra*. The blight alleviation plan was concocted after the condemning authority had *already* decided to condemn the property and transfer it to Columbia. Pet. at 21-23. As the Appellate Division explained, "[t]he contrast between ESDC's scheme for the redevelopment of Manhattanville and New London's plan for Fort Trumbull could not be more dramatic." *Kaur*, 892 N.Y.S.2d at 19.

d. There is no Dispute that Columbia Was an Identifiable Private Beneficiary of these Takings.

In *Kelo*, this Court emphasized that there is a greater risk of a pretextual taking when the identity of the private beneficiary is known at the time of the decision to condemn. *See Kelo,* 545 U.S. at 478 n.6; *id.* at 491-92 (Kennedy, J., concurring). In the present case, there is no doubt that Columbia's identity as the beneficiary of the condemnations was known in advance. Indeed, Columbia lobbied for the condemnations and designed the development project of which they were a part. Pet. at 21-23.

In short, the New York Court of Appeals has made it virtually impossible to challenge a taking as pretextual. As Justice Catterson of the Appellate Division recently explained, "[T]here is no longer any judicial oversight of eminent domain proceedings [in New York.]" *Uptown Holdings, LLC v. City of New York*, 2010 WL 3958687, at *3 (N.Y. App. Div. Oct. 12, 2010) (Catterson, J., concurring).

To sum up, there is disagreement between lower courts over the definition of what counts as a pretextual taking. The judicial abdication favored by the New York Court of Appeals and the Second Circuit stands in sharp contrast to the many federal courts and state supreme courts that have taken *Kelo*'s strictures against pretextual condemnations seriously.[8] The latter, however, disagree among themselves about the proper criteria by which to judge pretextual takings.

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[8] These cases all explicitly rely on *Kelo's* pretext analysis. Even where some of them do so in part to interpret their own state constitutions, this Court could serve an important purpose in clarifying the relevant doctrine, which depends in large part on its interpretation of the federal Constitution. *See, e.g., Three Affiliated Tribes v. World Engineering, P.C.*, 467 U.S. 150, 152 (1984) ("[the] Court retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law").

II. THE COURT MUST ESTABLISH CLEAR STANDARDS FOR PRETEXTUAL TAKINGS IN ORDER TO PROTECT THE RIGHTS OF NUMEROUS PROPERTY OWNERS AGAINST CONDEMNATIONS DRIVEN BY FAVORITISM.

The issues raised by this case affect the rights of property owners across the country who are threatened by economic-development or "blight" takings. If courts do not protect property rights against pretextual condemnations, many people—particularly the poor, racial minorities, and those lacking political influence—risk losing their homes and businesses to condemnations undertaken for the benefit of well-connected private parties.

This danger is exacerbated in states like New York, which define "blight" broadly, making it possible to declare virtually any area blighted and then condemn it for transfer to a private interest. New York also employs uniquely dubious and abuse-prone eminent-domain procedures.

A. Blight and Economic-Development Takings Threaten Numerous Property Owners.

Since World War II, as many as several million Americans have been forcibly displaced by blight and economic development takings. *See* Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings after* Kelo, 15 SUP. CT. ECON. REV.

183, 267-71 (2007) (citing relevant data). Property owned or rented by the poor, minorities, and politically weak individuals is especially likely to be targeted for condemnation for transfer to politically influential interest groups. *See id.* at 190-93, 267-71; Dick M. Carpenter II & John K. Ross, *Victimizing the Vulnerable* (Institute for Justice 2007); Brief for the NAACP et al. as Amici Curiae Supporting Petitioners, *Kelo v. City of New London*, 545 U.S. 469 (2004) (No. 04-108).

Nonprofit and religious organizations are also unusually vulnerable to these condemnations. Because nonprofits generally do not pay taxes on their property and often produce little in the way of economic development, they make tempting targets for local governments hoping to increase tax revenue. *See* Brief for Becket Fund for Religious Liberty as Amicus Curiae in support of Petitioners, *Kelo v. City of New London*, 545 U.S. 469 (2004) (No. 04-108), 2004 WL 2787141, at *8-11 & n.20 (explaining the special vulnerability of religious nonprofits and listing numerous examples where they have been targeted by economic-development takings). For example, numerous churches and other nonprofit institutions were condemned in the notorious 1981 *Poletown* case in Detroit, where an entire neighborhood was taken in order to clear the way for a new General Motors factory.[9] *See* Ilya Somin, *Overcoming Poletown:*

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[9] This condemnation was upheld by the Michigan Supreme Court in *Poletown Neighborhood Council v. City of Detroit*, 304

(Continued on following page)

County of Wayne v. Hathcock, *Economic Development Takings, and the Future of Public Use*, 2004 MICH. ST. L. REV. 1005, 1017-18 (2004).

The approach adopted by the New York Court of Appeals exacerbates this problem by giving condemning authorities virtually unlimited power to use eminent domain to benefit politically influential interests.

B. The Risk of Pretextual Condemnations Is Greater in States That Have a Virtually Unlimited Definition of Blight.

The dangers of pretextual takings are heightened in states like New York that have adopted a nearly limitless definition of blight that makes it possible for almost any area to be declared "blighted" and condemned. Under such laws, almost any private interest group with political clout can lobby to have an area declared "blighted" and transferred to it. Abuses of this kind often occur in states with broad definitions of blight. *See generally* Ilya Somin, *Blight Sweet Blight*, LEGAL TIMES, Aug. 14, 2006, at 42. Judicial scrutiny of potentially pretextual takings is necessary to ensure that broad definitions of blight do not become a license for takings that serve private interests at the expense of the public.

N.W.2d 455 (Mich. 1981), *overruled by County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

Since *Kelo,* forty-three states have passed laws that constrain or forbid "economic development" condemnations. *See* Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100 (2009). Many of these laws are strong enough to significantly curtail eminent domain abuse. *Id.* at 2138-49. In many states, however, restrictions on economic development condemnations are undercut by the retention of nearly unlimited definitions of "blight," which leave virtually any property vulnerable to condemnation. *See id.* at 2120-30 (describing these statutes in detail). Even in the aftermath of the political response to *Kelo,* there is a serious danger of pretextual blight condemnations in many jurisdictions.

C. New York Law Leaves Its Citizens Especially Vulnerable to Eminent-Domain Abuse.

New York law vastly increases the danger of pretextual takings in two ways. First, it has adopted an incredibly broad definition of "blight." Second, its eminent-domain procedures make it almost impossible for a citizen to question—let alone refute—a condemnor's assertion that the use of eminent domain is legally proper.

1. New York's Definition of "Blight" Is Extraordinarily Broad.

The definition of "blight" endorsed by the Court of Appeals in the present case and *Goldstein v. New York Urban Development Corporation*, 921 N.E.2d 164 (2009), is one of the broadest in the country, and therefore especially vulnerable to abuse.

In *Goldstein,* the court concluded that the property in question could be condemned as "blighted" and blight alleviation is a "public use" recognized by the New York Constitution, thanks to a constitutional amendment allowing the condemnation of slum areas. 921 N.E.2d at 171-73.

The court, despite conceding that the area "d[id] not begin to approach in severity the dire circumstances of urban slum dwelling" that led to the enactment of New York's state constitutional amendment allowing blight condemnations, found that "economic underdevelopment and stagnation" sufficed to constitute "blight." *Goldstein,* 921 N.E.2d. at 171-72. Since there is nearly always "room for reasonable difference of opinion" as to whether any area is "underdeveloped," the *Goldstein* standard is essentially limitless. *See id.* at 172.

In the present case, the Court of Appeals applied the same definition of blight. *See Kaur,* 15 N.Y.3d at 255. Indeed, members of New York's lower courts have already recognized that, after *Goldstein* and *Kaur,* "there is no longer any judicial oversight of" blight condemnations in New York. *Uptown Holdings*,

2010 WL 3958687, at *3 (Catterson, J., concurring). The field is therefore left wide open for pretextual condemnations.

2. New York's Unique Eminent-Domain Procedures Leave the State's Property Owners Particularly Vulnerable to Pretextual Takings.

The problems in New York's eminent-domain law are exacerbated by the fact that New York's eminent-domain procedures do not allow property owners access to any kind of adversarial process to build a record for judicial review. In general, would-be condemnors in New York are required to hold a public hearing on any proposed project involving eminent domain. N.Y. EDPL § 202. While holding a public meeting before a legislative determination is not unusual, New York is unique in that the public hearing is the *exclusive* means by which a factual record can be created for judicial review. N.Y. EDPL § 208. A property owner who wishes to contest taking of her property (as distinct from contesting the amount of compensation owed) is required to file an affirmative challenge, which is heard in the first instance by a mid-level appellate court. N.Y. EDPL § 207. At that hearing, the evidence eligible for review is strictly limited to the record of the public hearing. N.Y. EDPL § 208; *see also Brody v. Village of Port Chester*, 345 F.3d 103, 113-16 (2d Cir. 2003) (Sotomayor, J.) (discussing exclusivity of proceedings under Section 207).

In other words, a property owner in New York who claims a taking is pretextual is limited to the factual record created at a public hearing. This requirement ensures that he or she has no right to discovery and no right to question the condemnor's witnesses (or, at least, no right to demand answers). In fact, New York is literally the only state in which a person's property can be condemned as "blighted" without anyone ever having to testify under oath about why it is "blighted" or having to answer any hostile questions about whether the property is, in fact, blighted.[10] This uniquely circumscribed procedure makes New Yorkers particularly vulnerable to pretextual takings—which makes it all the more troubling that both the Second Circuit and the New York Court of Appeals have adopted such a radically permissive interpretation of *Kelo*.

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[10] New York is alone is refusing to provide any adversarial process to property owners challenging the validity of a taking. Perhaps the closest analogue to New York's system is California, which also requires that property owners challenge a blight determination in court immediately after the determination is made. Cal. Health & Safety Code § 33368 (2010). Even there, however, property owners retain the right to raise defenses (including the sorts of pretext claims at issue in this case) at the time of condemnation, and may avail themselves of ordinary trial-court procedures like discovery when they do. *See* Cal. Code Civ. Proc. §§ 1250.350-1250.370 (2010).

III. THE PRESENT CASE IS AN EXCELLENT VEHICLE FOR THIS COURT TO DEFINE THE MEANING OF PRETEXTUAL TAKINGS.

The present case is an excellent vehicle for this Court to define "pretextual" takings and resolve the widespread confusion in the lower courts on this important issue. As discussed above, the case features all four elements that this Court and lower courts have identified as possible indicators of a pretextual taking.

The Court can therefore use this case to consider the weight to be accorded to each of the four criteria. By doing so, it can provide needed guidance to state courts and lower federal courts, thereby upholding "the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347-48 (1816) (Story, J.).

The question of how best to weigh the different factors is one best addressed when and if this court decides to grant the petition for *certiorari*. Here, we mention just a few considerations relevant to each of the four factors.

Both the presence of a pretextual motive and that of a project where all or most of the benefits go to a private party are strong indications of a pretextual taking. If the government's objective in condemning property is to benefit a private party, it becomes a pure "A to B" taking of the sort that this Court has

always considered to be unconstitutional. *See Kelo*, 545 U.S. at 477 (noting that "it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*"). Similarly, if a private party monopolizes all or nearly all of the benefits of a taking, that is a strong indication that there is no public use behind it. A taking that "serve[s] no legitimate purpose of government" cannot "withstand the scrutiny of the public use requirement" and must be declared "void." *Midkiff*, 467 U.S. at 245.

The lack of an unbiased pre-condemnation planning process is at minimum an indication that favoritism is likely, triggering the need for heightened judicial scrutiny. *See Kelo*, 545 U.S. at 487 (noting that "a one-to-one transfer of property, executed outside the confines of an integrated development plan" may require additional judicial scrutiny); *id.* at 493 (Kennedy, J., concurring) (indicating that the fact that "[t]his taking occurred in the context of a comprehensive development plan" reduces the need for "a demanding level of scrutiny").

Finally, the presence of a private beneficiary whose identity was known in advance should also trigger a higher level of judicial scrutiny to guard against "the risk of undetected impermissible favoritism." *Id.* This is especially necessary in a case like the present one, where the private beneficiary itself initiated the project justifying the taking. *See* § I.E.2, *supra*.

By taking this case, the Court can resolve an important division of authority that has plagued state supreme courts and lower federal courts. It can also ensure the protection of vital constitutional property rights against pretextual condemnations.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of *certiorari*.

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173

No. 10-402

Supreme Court, U.S.
FILED
OCT 25 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

TUCK-IT-AWAY, INC., et al.,

Petitioners,

v.

NEW YORK STATE URBAN DEVELOPMENT CORPORATION, d/b/a EMPIRE STATE DEVELOPMENT CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of New York

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TABLE OF CONTENTS

	Page
INTEREST OF THE AMICUS CURIAE	1
STATEMENT OF THE CASE	1
SUMMARY OF REASONS TO GRANT THE PETITION	2
REASONS TO GRANT THE PETITION	3
I. THE COURT OF APPEALS IGNORED THE MINIMUM FIFTH AMENDMENT SAFEGUARDS THIS COURT ARTICULATED IN *KELO* AND ABDICATED ITS RESPONSIBILITY OF JUDICIAL REVIEW	3
II. THE BURDENS OF BLIGHT AND ECONOMIC DEVELOPMENT CONDEMNATIONS HAVE AND WILL CONTINUE TO FALL DISPROPORTIONATELY UPON RACIAL AND ETHNIC MINORITIES AND THE ECONOMICALLY DISADVANTAGED	7
A. URBAN REDEVELOPMENT CONDEMNATIONS HAVE HISTORICALLY BEEN USED TO TARGET LOW-INCOME AND RACIALLY DIVERSE NEIGHBORHOODS	8

TABLE OF CONTENTS – Continued

Page

B. AS EXEMPLIFIED BY THIS CASE, BLIGHT REMOVAL AND ECONOMIC DEVELOPMENT CONDEMNATIONS CONTINUE TO HAVE DISPROPORTIONATE IMPACTS ON MINORITIES AND THE ECONOMICALLY DISADVANTAGED 12

III. THE COURT OF APPEALS' HOLDING THAT ESDC DID NOT VIOLATE PETITIONERS' DUE PROCESS BY WILLFULLY OBSTRUCTING THEIR FOIL REQUESTS WAS INCORRECT AND DEMONSTRATES THE NEED FOR THIS COURT TO ESTABLISH MINIMUM STANDARDS FOR PROCEDURAL DUE PROCESS IN THE CONDEMNATION PROCESS..... 23

CONCLUSION 24

TABLE OF AUTHORITIES

Page

CASES

Berman v. Parker, 348 U.S. 26 (1954) 8, 9, 10, 12

Cincinnati v. Vester, 281 U.S. 439 (1930).....6

Fink v. Lefkowitz, 47 N.Y.2d 567 (1979) 23

Karesh v. City Council, 247 S.E.2d 342 (S.C. 1978).....13

Kelo v. New London, 545 U.S. 469 (2005).....*passim*

Levin v. Township of Bridgewater, 57 N.J. 506 (1971).....13

Marbury v. Madison, 5 U.S. 137 (1803).....5

Matter of Goldstein v. Urban Development Corporation, 13 N.Y.3d 511 (2009) 19

Matter of Kaur v. N.Y.S. Urban Dev. Corp., 72 A.D.3d 1 (App. Div. 1st Dep't 2009).....4, 5

Matter of Kaur v. N.Y.S. Urban Dev. Corp., 15 N.Y.3d 234 (2010).....4, 5, 6

Matter of Uptown Holdings, LLC v. City of New York, 2010 N.Y. Slip Op. 07227 (App. Div. 1st Dep't 2010) 6

Matter of West Harlem Bus. Group v. ESDC, 13 N.Y.3d 882 (2009).....23

NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978).....23

Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981) 13

TABLE OF AUTHORITIES – Continued

Page

United States v. Carolene Products Co., 304 U.S. 144 (1938) 7

Yonkers Community Development Agency v. Morris, 37 N.Y.2d 478 (1975) 13

STATUTES

Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) 11

Civil Rights Act of 1964, Pub. L. No. 88-352, 80 Stat. 1281 (1964) 11

Fair Housing Act, Pub. L. No. 90-284, tit. VIII, 82 Stat. 73 (1968) 11

Housing Act of 1949, 63 Stat. 413 8

Housing Act of 1954, 68 Stat. 590 8

N.Y. E.D.P.L. § 208 23

N.Y. Pub. Off. §§ 84-90 23

COURT DOCUMENTS

Kaur Petition to the Court of Appeals 18

Record on Appeal to the Court of Appeals 17, 18

TABLE OF AUTHORITIES – Continued

Page

Brief of Amici Curiae Nat'l Ass'n for the Advancement of Colored People, AARP, Hispanic Alliance of Atlantic County, Inc., Citizens in Action, Cramer Hill Resident Ass'n, Inc., and the Southern Christian Leadership Conf. in Support of Petitioners, 2004 WL 2811057 ..... 16, 20, 22

SECONDARY SOURCES

Amy Lavine, *Urban Renewal and the Story of* Berman v. Parker, 42 URB. LAW. 423 (2010) 8, 10

Amy Lavine and Norman Oder, *Urban Redevelopment Policy, Judicial Deference to Unaccountable Agencies, and Reality in Brooklyn's Atlantic Yards Project*, 42 URB. LAW. 287 (2010) 19

Charles Toutant, *Alleging Race-Based Condemnation*, N.J.L.J., Aug. 2, 2004 14

COMMUNITY BOARD 9 MANHATTAN 197-A PLAN: HAMILTON HEIGHTS, MANHATTANVILLE, MORNINGSIDE HEIGHTS 29 (2007) 21

Daphne Eviatar, *The Manhattanville Project*, THE NEW YORK TIMES MAGAZINE, May 21, 2006 ..... 17, 18

David A. Dana, *Exclusionary Eminent Domain*, 17 S. CT. ECON. REV. 7 (2009) 13

David Firestone, *Black Families Resist Mississippi Land Push*, N.Y. TIMES, Sep. 10, 2001 14

TABLE OF AUTHORITIES – Continued

Page

DICK M. CARPENTER II, PH.D. & JOHN K. ROSS, VICTIMIZING THE VULNERABLE: THE DEMOGRAPHICS OF EMINENT DOMAIN at 6 (Institute for Justice 2007) 14

Gideon Kanner, *"Unequal Justice Under Law": The Invidiously Disparate Treatment of American Property Owners in Takings Cases*, 40 LOY. L.A. L. REV. 1065 (2007) 19

Herbert J. Gans, *The Failure of Urban Renewal: A Critique and Some Proposals*, in URBAN RENEWAL (Bellush, ed.) 11

HERBERT J. GANS, THE URBAN VILLAGERS: GROUP AND CLASS IN THE LIFE OF ITALIAN-AMERICANS (2d ed. 1982) 20

Jarrett Murphy, *History Lesson: Three decades after the drama of '68, will Harlem make room for Columbia?*, THE VILLAGE VOICE, May 16, 2006 21

Jody Arogeti, Anita Bhushan, Jill M. Irvin & Jessica Kattula, *Eminent Domain*, 23 GA. ST. U.L. REV. 157 (2006) 19

John A. Powell and Marguerite L. Spencer, *Giving Them the Old "One-Two": Gentrification and the K.O. of Impoverished Urban Dwellers of Color*, 46 HOW. L.J. 433 (2003) 16, 20

TABLE OF AUTHORITIES – Continued

Page

Keith H. Hirokawa and Patricia Salkin, *Can Urban University Expansion and Sustainable Development Co-Exist? A Case Study in Progress on Columbia University*, 37 FORDHAM URB. L.J. 637 (2010) 17

Kevin Douglas Kuswa, *Suburbification, Segregation, and the Consolidation of the Highway Machine*, 3 J.L. SOC'Y 31 (2002).....9

KENNETH JACKSON, CRABGRASS FRONTIER (Oxford Univ. Press 1987).....11

Michele Alexandre, *"Love Don't Live Here Anymore": Economic Incentives for a More Equitable Model of Urban Redevelopment*, 35 B.C. ENVTL. AFF. L. REV. 1 (2008).....19

MINDY FULLILOVE, ROOT SHOCK: HOW TEARING UP CITY NEIGHBORHOODS HURTS AMERICA, AND WHAT WE CAN DO ABOUT IT (One World/ Ballantine 2004).....22

Miriam Axel-Lute, *Will Columbia Take Manhattanville?*, SHELTERFORCE, Mar. 22, 2008.....17

New York City Dep't of City Planning, Manhattanville Final Environmental Impact Statement (2007).....14, 15

Paul Boudreaux, *Eminent Domain, Property Rights, and the Solution of Representation Reinforcement*, 83 DENV. U.L. REV. 1 (2005)....13, 19

ROBERT CARO, THE POWER BROKER (1974).....11

TABLE OF AUTHORITIES – Continued

Page

SCOTT A. GREER, URBAN RENEWAL AND AMERICAN CITIES: THE DILEMMA OF DEMOCRATIC INTERVENTION (1965) 20

Sheila R. Foster and Brian Glick, *Integrative Lawyering: Navigating the Political Economy of Urban Redevelopment*, 95 CALIF. L. REV. 1999 (2007) 12

Stephen Clowney, *Invisible Businessman: Undermining Black Enterprise with Land Use Rules*, 2009 U. ILL. L. REV. 1061 (2009) 21

Timothy Williams, *In West Harlem Land Dispute, It's Columbia vs. Residents*, THE NEW YORK TIMES, Nov. 20, 2006 21

U.S. Environmental Protection Agency, Environmental Justice Website 17

Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1 (2003) 8, 9

INTEREST OF THE AMICUS CURIAE[1]

The amicus represents the 30th Senatorial District of New York, which encompasses the Manhattanville site of Columbia University's proposed expansion project. As the representative of residents and businesses who would be adversely affected by the project, amicus has a very strong interest in ensuring that development within the district proceeds equitably and fairly, especially for the district's minority and economically disadvantaged residents. These groups, although marginalized in the project approval process, would be disproportionately impacted by the expansion project.

STATEMENT OF THE CASE

Amicus adopts the statement of the case presented in the petition.

[1] The parties were notified ten days prior to the due date of this brief of the intention to file and consent was granted. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF REASONS TO GRANT THE PETITION

In this case, Respondent Empire State Development Corporation (ESDC) determined that Petitioners' well-maintained but not fully built-out properties were blighted in order to facilitate their transfer to Columbia University, a private and politically favored institution. The New York Court of Appeals, under the guise of deference to ESDC's administrative decision, abdicated its responsibility to provide meaningful review of Petitioners' pretext claims. This was not simply error, but a direct result of lower court confusion over the scope and applicability of this Court's decision in *Kelo v. New London*, 545 U.S. 469 (2005). The need for clarification of *Kelo*'s takings jurisprudence on pretext is especially important given the nature of urban redevelopment in the United States, which targets the most marginal and least influential communities. Far too often, its negative impacts have fallen disproportionately on racial and ethnic minorities and the economically disadvantaged. The Court of Appeals also rejected Petitioners' claim that their rights to procedural due process were violated by ESDC's willful obstruction of Petitioners' attempts to obtain public documents through the New York State Freedom of Information Law. This result runs counter to the spirit and intent of freedom of information laws, and demonstrates the need for this Court to establish minimum standards

of due process in the context of eminent domain proceedings.

REASONS TO GRANT THE PETITION

I. THE COURT OF APPEALS IGNORED THE MINIMUM FIFTH AMENDMENT SAFEGUARDS THIS COURT ARTICULATED IN *KELO* AND ABDICATED ITS RESPONSIBILITY OF JUDICIAL REVIEW

As argued in Petitioners' brief, the Court of Appeals ignored this Court's statement in *Kelo* that the Fifth Amendment prohibits a governmental entity from "tak[ing] property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." *Kelo*, 545 U.S. at 478. Specifically, the court below ignored the factors discussed by Justice Kennedy and the *Kelo* majority as relevant to identifying impermissible favoritism toward specific private parties. *Kelo*, 545 U.S. at 450-51, 483-84; *Kelo,* 545 U.S. at 491-93 (Kennedy, J., concurring). The Court of Appeals' failure to even mention *Kelo* demonstrates its disregard for this Court's precedent.

Unlike the Court of Appeals, and in line with *Kelo*, the plurality decision of the First Department Appellate Division identified evidence of pretext and reviewed the record to determine the merit of Petitioners' claims. Relying on *Kelo*, the court identified a number of relevant factors, including:

> 1. The city's awareness of its depressed economic condition. . . .
>
> 2. The formulation of a comprehensive development plan meant to address a serious citywide depression.
>
> 3. The substantial commitment of public funds to the project before most of the private beneficiaries were known.
>
> 4. The city's review of a variety of development plans.
>
> 5. The city's choice of a private developer from a group of applicants rather than picking out a particular transferee beforehand.
>
> 6. The identities of most of the private beneficiaries being unknown at the time the city formulated its plan.
>
> 7. The city's compliance with elaborate procedural requirements that facilitate the review of the record and inquiry into the city's purposes.
>
> *Matter of Kaur v. N.Y.S. Urban Dev. Corp.*, 72 A.D.3d 1, 8-9 (App. Div. 1st Dep't 2009) (citing *Kelo*, 545 U.S. at 491-93 (Kennedy, J., concurring), *rev'd*, 15 N.Y.3d 235 (2010)).

Despite this Court's guidance in *Kelo* and the plurality decision of the appellate division below, the Court of Appeals discussed only one aspect of the case as relevant to the question of pretext: namely, the conflict of interest created by ESDC using the

developer's consultant to prepare one of the project's blight studies. *Matter of Kaur v. N.Y.S. Urban Dev. Corp.*, 15 N.Y.3d 234, 255 (2010). While this was certainly an important consideration relevant to Petitioners' claims, the court did not take into account Petitioners' other evidence of pretext. The court, did not mention, for example, that the project site had not been deemed blighted or included in an urban renewal area prior to Columbia's proposal. *Matter of Kaur v. N.Y.S. Urban Dev. Corp.*, 72 A.D.3d at 9. It did not acknowledge that Columbia – the developer – was the sole originator of the project and that no outside developers were solicited for proposals. *Id.* at 10. Nor did the court consider that Columbia's general project plan disregarded the long-standing community-based planning efforts of Community Board 9. *Id.* Additionally, the court failed to see the significance of Columbia "underwriting" (or "buying") the entire project planning process. *See id.* at 9-10. In all of these respects, the case at bar presents a much more likely scenario of pretext than *Kelo*, yet the same factors that rendered the *Kelo* condemnations constitutional under the Fifth Amendment were treated as mere surplusage by the Court of Appeals.

By refusing to consider Petitioners' evidence that the project is intended primarily to benefit Columbia, the court abdicated its responsibility to engage in judicial review and protect Petitioners' constitutional rights. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). As

an appellate judge stated in a recent case, the Court of Appeals' decision in *Kaur* "made plain that there is no longer any judicial oversight of eminent domain proceedings." *Matter of Uptown Holdings, LLC v. City of New York*, 2010 N.Y. Slip Op. 07227 (App. Div. 1st Dep't 2010) (Catterson, J. concurring). While *Kelo's* definition of "public use" is indeed broad, the Fifth Amendment must not be read so broadly as to eliminate the judiciary's role to define the boundaries of the law. *See Cincinnati v. Vester*, 281 U.S. 439, 446 (1930) ("the question what is a public use. . . . remains a judicial one which this Court must decide in performing its duty of enforcing the provisions of the Federal Constitution."). As Justice Kennedy explained in his *Kelo* concurrence, "[a] court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit[.]" *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring). Because the decision below reflects a basic disregard of *Kelo* and the minimum protections of the Fifth Amendment, this Court should accept certiorari to explain how *Kelo's* discussion of pretext is to be interpreted by the lower courts. If the decision is allowed to stand, it will prohibit all but the most toothless standard of judicial review in future condemnation cases. This result must be avoided.

II. THE BURDENS OF BLIGHT AND ECONOMIC DEVELOPMENT CONDEMNATIONS HAVE AND WILL CONTINUE TO FALL DISPROPORTIONATELY UPON RACIAL AND ETHNIC MINORITIES AND THE ECONOMICALLY DISADVANTAGED

There can be little doubt that blight removal and economic development condemnations disproportionately impact already marginalized groups, including tenants, the elderly, persons of low-income, and racial and ethnic minorities. Condemnees who belong to "discrete and insular minorities," as well as other disadvantaged groups, are not only marginalized in the political processes surrounding redevelopment projects, they are also confronted with especially severe impacts from displacement. *See Kelo*, 545 U.S. at 521 (Thomas, J., dissenting) (citing *United States v. Carolene Products Co.*, 304 U.S. 144, 152, n.4 (1938)). Although this Court has recognized that blight removal and economic development takings generally serve public purposes, the prevalence of eminent domain abuse in the redevelopment setting and the fact that these takings also cause disproportionate harm to minority and low-income communities provides a compelling reason for this Court to grant review. The lower courts, as illustrated by this case, need guidance regarding pretext challenges, and the toothless judicial review required by the decision below will encourage redevelopment agencies to appropriate property for private purposes under the guise of economic development. The consequences, unfortunately, will be predictable: the benefits will

accrue to the wealthy and politically-connected, and the burdens will fall on those least able to bear them.

A. URBAN REDEVELOPMENT CONDEMNATIONS HAVE HISTORICALLY BEEN USED TO TARGET LOW-INCOME AND RACIALLY DIVERSE NEIGHBORHOODS

Local urban renewal programs proliferated in the 1950s and 1960s following the appropriation of federal funding for slum clearance[2] and this Court's broad approval of these projects in *Berman v. Parker*, 348 U.S. 26 (1954). While urban renewal programs did alleviate truly squalid and economically depressing conditions in many instances, they were often motivated as much by the interests of business elites and local governments in increasing central city tax revenues and luring wealthy residents back to urban areas.[3] They were also used to perpetuate racial segregation and limit the mobility of African Americans and other minorities. As the legal

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[2] Housing Act of 1949, 63 Stat. 413; Housing Act of 1954, 68 Stat. 590. *See generally* Amy Lavine, *Urban Renewal and the Story of* Berman v. Parker, 42 URB. LAW. 423 (2010) (discussing the social and legal history of national urban renewal policies).

[3] *See, e.g.*, Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1 (2003) (discussing how "blight" was abused to benefit business and commercial interests); Lavine, *supra* n.2 (providing a historical account of the condemnation at issue in *Berman v. Parker*).

scholar and urban historian Wendell Pritchett has explained:

> Blight was a facially neutral term infused with racial and ethnic prejudice. While it purportedly assessed the state of urban infrastructure, blight was often used to describe the negative impact of certain residents on city neighborhoods. This "scientific" method of understanding urban decline was used to justify the removal of blacks and other minorities from certain parts of the city. By selecting racially changing neighborhoods as blighted areas and designating them for redevelopment, the urban renewal program enabled institutional and political elites to relocate minority populations and entrench racial segregation.[4]

The neighborhood that was at issue in *Berman v. Parker*, Southwest Washington, D.C., suffered just this fate. Although the project area did suffer from truly blighted conditions, *see Berman*, 348 U.S. at 30, the redevelopment also destroyed one of the few then-integrated parts of the city and forced thousands of predominantly African American residents out of

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[4] Pritchett, *supra* n.3, at 6 (2003); *see also* Kevin Douglas Kuswa, *Suburbification, Segregation, and the Consolidation of the Highway Machine*, 3 J.L. SOC'Y 31, 53 (2002) (describing "a governing apparatus operating through housing and the highway machine [that] implemented policies to segregate and maintain the isolation of poor, minority, and otherwise outcast populations.").

their homes.[5] Shortly after the decision, affordability requirements for housing in the redevelopment area were removed from the plan, even though they were one of its most important justifications.[6] The advice of public housing officials was ignored and vast swaths of cleared land ended up lying vacant while housing options for low and moderate income residents dwindled.[7] Relocation assistance was often inadequate, a problem that was compounded by the fact that condemnation awards were routinely undervalued.[8] A tour of Southwest today does not convey these injustices, but the fact that it has matured into a functioning residential area does not diminish the harm that was inflicted in the process.[9] Simply stated, the ends do not always justify the means.

Berman's extremely deferential rational basis standard of review allowed urban renewal projects to go forward across the country with an astonishing lack of attention to the welfare of the people that the programs were supposed to benefit. For example, although urban renewal agencies were technically required by federal law to ensure that adequate housing would be available for displaced residents, relocation assistance was often "ruthless" in its

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[5] Lavine, *supra* n.2, at 452.

[6] Lavine, *supra* n.2, at 467-69.

[7] *Id.*

[8] *Id.*

[9] *Id.* at 474.

inadequacy.[10] And in many cities, the racial impacts of urban renewal projects were so egregious that they became known as "Negro removal."[11] The scale of municipal urban renewal programs, by itself, was often astonishing. In New York City alone, a conservative estimate is that at least 170,000 people were forcibly displaced during the 1950s and 1960s.[12]

Even if federal housing and slum clearance policies were based on benevolent intentions,[13] by the mid-1960s a consensus had formed that urban renewal was a social and governmental failure. Eventually, Congress recognized the institutional failures of the urban renewal program and enacted important changes to curb discriminatory practices.[14] The deeply

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[10] Herbert J. Gans, *The Failure of Urban Renewal: A Critique and Some Proposals*, in URBAN RENEWAL 467-68 (Bellush, ed.) (noting that between 1949 and 1964, only .05% of federal urban renewal funding was spent on relocation).

[11] The term was coined during a 1963 interview of the writer and civil rights activist James Baldwin. A video of this interview is available on the PBS website, http://www.pbs.org/wgbh/amex/mlk/sfeature/sf_video_pop_04b_qt.html. The transcript is available at http://www.pbs.org/wgbh/amex/mlk/sfeature/sf_video_pop_04b_tr_qry.html.

[12] ROBERT CARO, THE POWER BROKER 965-67.

[13] Many federal housing policies grew out of New Deal programs, and by some accounts they were intended more to stimulate the economy than to aid poor persons directly. *See, e.g.*, KENNETH JACKSON, CRABGRASS FRONTIER, at chapter 11 (Oxford Univ. Press 1987).

[14] The Civil Rights Act of 1964 provided a cause of action to challenge discrimination in public housing and federally funded programs. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat.

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troubling aftermath of *Berman*, however, stands as a reason to counsel prudence and caution in granting redevelopment agencies such broad powers of eminent domain. The instant case presents this Court with the opportunity to give lower courts guidance regarding private and pretextual takings, and this Court should do so to ensure that *Kelo*'s legacy does not become as stained as *Berman's*.

B. AS EXEMPLIFIED BY THIS CASE, BLIGHT REMOVAL AND ECONOMIC DEVELOPMENT CONDEMNATIONS CONTINUE TO HAVE DISPROPORTIONATE IMPACTS ON MINORITIES AND THE ECONOMICALLY DISADVANTAGED

Congress discontinued funding for urban renewal in the 1970s, leading local redevelopment agencies to rely more heavily on private capital for redevelopment projects.[15] The growing influence of private

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241, tit. III (Desegregation of Public Facilities); *id.* tit. VI (nondiscrimination in federally assisted programs). In 1966, Congress passed the Widnall Amendment to the Housing Act, which required that a "substantial number" of residential units in redevelopment areas had to be affordable. 80 Stat. 1281 (1966). Finally, the Fair Housing Act was enacted in 1968 to eliminate redlining and discrimination in both public and private housing accommodations. Fair Housing Act, Pub. L. No. 90-284, tit. VIII, 82 Stat. 73 (1968).

[15] *See* Sheila R. Foster and Brian Glick, *Integrative Lawyering: Navigating the Political Economy of Urban Redevelopment*, 95 CALIF. L. REV. 1999, 2019-2021 (2007).

developers and employers fostered competition among local governments to retain and attract businesses, leading to the increased use of development subsidies, including eminent domain. Eventually, many jurisdictions, including New York, came to see the use of eminent domain to foster industrial and commercial development as a public use in itself, with or without the presence of blight. *See, e.g., Levin v. Township of Bridgewater*, 57 N.J. 506 (1971) (upholding the condemnation for shopping mall); *Karesh v. City Council*, 247 S.E.2d 342 (S.C. 1978) (upholding condemnation for convention center); *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981) (upholding condemnation for General Motors plant); *Yonkers Community Development Agency v. Morris*, 37 N.Y.2d 478 (1975) (upholding condemnation for Otis Elevator Company plant). *Kelo* reached the same result, holding that economic development, standing alone, is a public use.

Whether redevelopment takings are based on economic development or blight removal, however, "[t]here is ample evidence that localities across the nation are using eminent domain to discourage poor residents and to encourage the affluent, either through attractive (and high-priced) housing stock or retail facilities that both pay high taxes and attract an affluent clientele."[16] According to a 2007 study,

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[16] Paul Boudreaux, *Eminent Domain, Property Rights, and the Solution of Representation Reinforcement*, 83 DENV. U.L. REV. 1, 20 (2005); *see also* David A. Dana, *Exclusionary Eminent*

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"[e]minent domain project areas include a significantly greater percentage of minority residents (58%) compared to their surrounding communities (45%). Median incomes in project areas are significantly less ($18,935.71) than the surrounding communities ($23,113.46), and a significantly greater percentage of those in project areas (25%) live at or below poverty levels compared to surrounding cities (16%)." Similar disparities were found regarding education levels.[17]

Redeveloping Manhattanville as an exclusive Columbia campus would follow these patterns. Although only a relatively small number of residents would be directly displaced by the project – about 300, according to the environmental impact statement (EIS)[18] – between 3,000 and 5,000 residents living near the project site will be indirectly

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Domain, 17 S. CT. ECON. REV. 7, 40-47 (2009) (discussing "exclusionary eminent domain"); Charles Toutant, *Alleging Race-Based Condemnation*, N.J.L.J., Aug. 2, 2004 (discussing litigation alleging that cities and towns target minority areas in an attempt to force them from the community in favor of those the local government considers more desirable); David Firestone, *Black Families Resist Mississippi Land Push*, N.Y. TIMES, Sep. 10, 2001.

[17] DICK M. CARPENTER II, PH.D. & JOHN K. ROSS, VICTIMIZING THE VULNERABLE: THE DEMOGRAPHICS OF EMINENT DOMAIN 6 (Institute for Justice 2007), *available at* http://www.ij.org/images/pdf_folder/other_pubs/Victimizing_the_Vulnerable.pdf.

[18] New York City Dep't of City Planning, Manhattanville Final Environmental Impact Statement 4-2 (2007), *available at* http://www.nyc.gov/html/dcp/pdf/env_review/manhattanville/04.pdf [hereinafter EIS].

displaced.[19] Displacement, moreover, will disproportionately affect low income and minority households. According to the EIS, 43.2% of the households in the primary study area have annual incomes of less than $20,000, compared with 25.4% for Manhattan and 29% for New York City as a whole. (The percentage of residents with annual incomes over $125,000, on the other hand, was only 4%, compared to 17.7% for Manhattan and 8.6% for the city.)[20] Regarding race and ethnicity, the EIS estimated that the primary study area was composed of 29.4% African Americans and 52.3% Latinos, compared with 15.3% and 27.2%, respectively, for Manhattan, and 24.5% and 27.2% for New York City as a whole.[21] When juxtaposed with the members of Columbia's elite Ivy League community, questions of class and race simply cannot be avoided. This is especially true in Harlem, one of the country's most important centers of African American culture.

The causes of these socioeconomic impacts are inherent to the process of urban redevelopment and the decision below will encourage this type of inequitable development throughout New York State and in other

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[19] Although opponents have cited 5,000 as the number of Harlem residents threatened by indirect displacement, the environmental impact statement places that number at 3,293. *Id.* at 4-89. Accurate predictions of displacement effects are difficult to make.

[20] *Id.* at 4-16.

[21] *Id.* at 4-14.

states that adopt New York's policy of complete judicial deference. Economically disadvantaged and minority neighborhoods, even in the absence of intentional discrimination, are disproportionately affected by blight and redevelopment takings because they are more politically palatable targets than higher-income neighborhoods.[22] Condemnations are likely to face fewer challenges from tenants and residents with limited resources and little access to legal counsel, and the cost of acquiring land in low-income neighborhoods makes them economically attractive areas for developers and investors. *See Kelo*, 545 U.S. at 521-22 (Thomas, J., dissenting).

The inherently inequitable nature of redevelopment projects offends basic principles of Environmental Justice, which seeks to ensure "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations,

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[22] *See* John A. Powell and Marguerite L. Spencer, *Giving Them the Old "One-Two": Gentrification and the K.O. of Impoverished Urban Dwellers of Color*, 46 How. L.J. 433, 440-41 (2003) (discussing the "new frontier" ideology that draws redevelopment and gentrification toward low-income, working-class, and racially diverse communities); *Kelo v. New London*, Brief of Amici Curiae Nat'l Ass'n for the Advancement of Colored People, AARP, Hispanic Alliance of Atlantic County, Inc., Citizens in Action, Cramer Hill Resident Ass'n, Inc., and the Southern Christian Leadership Conf. in Support of Petitioners, 2004 WL 2811057 [hereinafter NAACP Amicus Brief].

and policies."[23] The top-down, Columbia-driven decision making process in this case exemplifies practices that were not designed to involve the West Harlem community in a meaningful manner.[24] The project will also produce inequitable distributions of both environmental goods and environmental burdens, another basic element of environmental injustice. The Harlem Piers Park, for example, which was built only after years of insistence from the community, will be effectively cut off from the rest of Harlem by Columbia's campus.[25] And while Columbia contends that the campus will be open to the public and will create

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[23] U.S. Environmental Protection Agency, Environmental Justice, Basic Information, http://www.epa.gov/compliance/ej/basics/index.html.

[24] *See* Keith H. Hirokawa and Patricia Salkin, *Can Urban University Expansion and Sustainable Development Co-Exist?: A Case Study in Progress on Columbia University*, 37 FORDHAM URB. L.J. 637, 675-80 (2010); Miriam Axel-Lute, *Will Columbia Take Manhattanville?*, SHELTERFORCE, Mar. 22, 2008, *available at* http://www.shelterforce.org/article/print/213/ ("The fight over Manhattanville is a quintessential, if extreme, example of how difficult it is for communities to be heard when powerful institutional neighbors propose development or redevelopment.").

[25] A City Planning Department official acknowledged that "the open green space . . . could be perceived as an interruption of access to the river and as an enclave for Columbia." Record on Appeal to the Court of Appeals, R-19 at 628. *See also* Daphne Eviatar, *The Manhattanville Project*, THE NEW YORK TIMES MAGAZINE, May 21, 2006, *available at* http://www.nytimes.com/2006/05/21/magazine/21wwln.essay.html ("Many residents are disturbed by the placement of the campus between a park being built at the West Harlem Pier and the community that fought for years to have that park created.").

publicly accessible open space rather than obscuring it, it will nevertheless be privately-owned open space patrolled by a private security staff and controlled by Columbia's rules and policies.[26] Moreover, the project will actually result in a net decrease in per capita open space due to the additional population it will bring to the area,[27] and pollution from the project's construction will burden the existing residents and workers in nearby neighborhoods, rather than those who would eventually benefit from the redevelopment.

In addition to typifying the basic unfairness of the redevelopment process, this case also illustrates the inherent susceptibility of redevelopment projects to abuse and rent seeking. Public choice theory suggests that economic development agencies will be prone to capture by private interests,[28] and the result

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[26] Kaur Petition to the Court of Appeals at 20 (explaining that the campus would only be open to the public until 8:00 PM between November and April, unlike city parks, most of which are open until 11:00 PM); Eviatar, *supra* n.25 ("It's a quad. That's not a piazza. That's not open space for a community.") (quoting Rev. Earl Kooperkamp).

[27] Kaur Petition to the Court of Appeals at 16; Record on Appeal to the Court of Appeals, R. 2 at 6-35 to 6-37.

[28] Public choice theory rejects the assumption that democratic governments represent the people and strive to serve a body of common public interests. Instead, "the 'public choice' school, argues that there is no such thing as the 'public interest,' only initiatives that help one private interest or the other. Laws adopted ostensibly to help the public are in reality the masked use of government to help one group at the expense of others[.]"

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is that "[t]he beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms." *Kelo*, 545 U.S. at 505 (O'Connor, J., dissenting). Moreover, many redevelopment agencies, ESDC included, are run by unelected boards that insulate them from public opinion and allow private interests to more easily influence the eminent domain process to their own advantage.[29] The extremely low threshold for finding blight in New York, *see Matter of Goldstein v. Urban Development Corporation*, 13 N.Y.3d 511, 527 (2009), gives even more advantage to politically connected developers. Unfortunately, the combination creates a perverse incentive for developers to seek blight determinations for economically desirable areas, rather than areas truly suffering from substandard conditions or market problems necessitating government intervention.

Blight removal and economic development takings also impose especially harmful burdens on the

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Boudreaux, *supra* n.16, at 18; *see also* Michele Alexandre, *"Love Don't Live Here Anymore": Economic Incentives for a More Equitable Model of Urban Redevelopment*, 35 B.C. ENVTL. AFF. L. REV. 1, 14 (2008).

[29] *See* Amy Lavine and Norman Oder, *Urban Redevelopment Policy, Judicial Deference to Unaccountable Agencies, and Reality in Brooklyn's Atlantic Yards Project*, 42 URB. LAW. 287, 306-308 (2010); Gideon Kanner, *"Unequal Justice Under Law": The Invidiously Disparate Treatment of American Property Owners in Takings Cases*, 40 LOY. L.A. L. REV. 1065, 1082-83 (2007); Jody Arogeti, Anita Bhushan, Jill M. Irvin & Jessica Kattula, *Eminent Domain*, 23 GA. ST. U.L. REV. 157, 182 (2006).

people they displace. Residents often have limited resources to cope with displacement, and they are typically priced-out from returning after the completion of redevelopment. Instead, low-income households are typically forced to move to other low-income areas, thereby perpetuating problems related to concentrated poverty and increasing disparity in the distribution of social resources such as schools and transit.[30] Redevelopment projects also tend, perversely, to decrease overall affordable housing stocks such that rehousing options are often more expensive.[31]

The businesses located in urban renewal areas, which are often small and locally-owned, face similar relocation problems. In highly urbanized areas, certain types of "disfavored" businesses, such as beauty shops, auto repairs, and second-hand stores, may face particular difficulties in securing properly-zoned and affordable relocation sites. These businesses, however, offer important commercial services to neighboring areas, and they often provide increased opportunities

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[30] *See* Powell and Spencer, *supra* n.22, at 441-42, 454-57; *see also* NAACP Amicus Brief, *supra* n.22, at *12.

[31] *See, e.g.*, HERBERT J. GANS, THE URBAN VILLAGERS: GROUP AND CLASS IN THE LIFE OF ITALIAN-AMERICANS 380 (2d ed. 1982) (indicating that 86% of the displaced residents in one redevelopment were paying higher rents at their new residences, with median rents almost doubling); SCOTT A. GREER, URBAN RENEWAL AND AMERICAN CITIES: THE DILEMMA OF DEMOCRATIC INTERVENTION 3 (1965) (citing multiple studies and concluding that "[a]ll ten . . . indicate substantial increases in housing costs").

for minority and low-income entrepreneurs.[32] In this case, industrial displacement will impact business owners and employees alike. As the local Community Board's plan explained, "[g]iven the combined factors of race, ethnicity, unemployment, limited educational attainment and concentration of such persons within specific areas of [Community District 9], it is important to note that industrial employment is an important economic sector to strengthen in order to elevate the socioeconomic well being of these residents and the city as a whole."[33] Columbia's project may produce permanent jobs, but many of the academic and institutional positions will be unavailable to existing neighborhood residents and employees.[34]

Moreover, contrary to the connotation of "just compensation," these economic harms are typically undervalued in the condemnation process. "The fact

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[32] *See* Stephen Clowney, *Invisible Businessman: Undermining Black Enterprise with Land Use Rules*, 2009 U. Ill. L. Rev. 1061, 1077-78.

[33] Community Board 9 Manhattan 197-a Plan: Hamilton Heights, Manhattanville, Morningside Heights 29 (2007), *available at* http://prattcenter.net/sites/default/files/users/images/CB9M_Final_24-Sep-07.pdf.

[34] *See* Timothy Williams, *In West Harlem Land Dispute, It's Columbia vs. Residents*, The New York Times, Nov. 20, 2006, http://www.nytimes.com/2006/11/20/nyregion/20columbia.html?pagewanted=all (quoting Jordi Reyes-Montblanc); Jarrett Murphy, *History Lesson: Three decades after the drama of '68, will Harlem make room for Columbia?*, The Village Voice, May 16, 2006, http://www.villagevoice.com/2006-05-16/news/history-lesson/1 (quoting Nellie Bailey).

that particular property is identified and designated for 'economic development,' . . . almost certainly means that the market is currently undervaluing that property or that the property has some 'trapped' value that the market is not currently recognizing."[35] Nor are condemnees entitled to any increased compensation based on the value of the property to the developer. As a result, their losses become a windfall for the taking's private beneficiaries.[36]

In addition to these economic impacts, displacement carries with it subjective harms as well. The elderly, for example, are particularly susceptible to psychological stress from being dislocated from their homes. Ethnic neighborhoods that have established social support networks also suffer particular harm from blight removal and economic development takings. In addition to destroying community support mechanisms, the destruction of these neighborhoods often impedes "those groups' ability to exercise what little political power they may have established as a community."[37]

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[35] NAACP Amicus Brief, *supra* n.22, at *12.

[36] *Id.*

[37] *Id.*; MINDY FULLILOVE, ROOT SHOCK: HOW TEARING UP CITY NEIGHBORHOODS HURTS AMERICA, AND WHAT WE CAN DO ABOUT IT (One World/Ballantine 2004).

III. THE COURT OF APPEALS' HOLDING THAT ESDC DID NOT VIOLATE PETITIONERS' DUE PROCESS BY WILLFULLY OBSTRUCTING THEIR FOIL REQUESTS WAS INCORRECT AND DEMONSTRATES THE NEED FOR THIS COURT TO ESTABLISH MINIMUM STANDARDS FOR PROCEDURAL DUE PROCESS IN THE CONDEMNATION PROCESS

New York is unique among the states in denying condemnees a trial on the issue of public use. N.Y. E.D.P.L. § 208. Despite this already diluted procedural framework, however, ESDC resisted complying with Petitioners' Freedom of Information Law (FOIL) requests until after it had closed the administrative record. *See* N.Y. Pub. Off. §§ 84-90. The agency's obstructionist behavior, *see Matter of West Harlem Bus. Group v. ESDC*, 13 N.Y.3d 882 (2009), provides additional grounds to suspect pretext in this case, as does the Petillo email, which was finally produced by ESDC more than a year after the record was closed. *See* Petition at 35-36. More fundamentally, the agency's willful obfuscation offends the basic principles underlying freedom of information laws, which are intended to ensure a minimum amount of transparency in government operations. *See Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979) (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)). Allowing ESDC to impede the FOIL process, especially when Petitioners were precluded from bringing their claims to trial, is unjust and will only encourage redevelopment agencies to resist FOIL

requests to hide evidence of pretext and favoritism. The most minimal standards of procedural due process must proscribe this type of behavior, for a system that permits government agencies to willfully hide evidence of their unconstitutional motives denies condemnees any meaningful opportunity to challenge the taking of their property. This Court has not previously had the opportunity to define the minimum procedural due process requirements in the condemnation context, and should accept certiorari to clarify the issue.

CONCLUSION

This Court, in *Kelo*, recognized that pretextual motivations could render an economic development taking unconstitutional, but it declined to provide additional guidance on the issue until confronted with such a case. Amicus respectfully submits that this is such a case, and urges the Court to grant review to clarify the minimum requirements of the Fifth Amendment and ensure that Petitioners receive adequate judicial review. The easily manipulated character of urban redevelopment projects and the disproportionately negative racial and socioeconomic impacts inherent to the process, as exemplified in this case, make it even more imperative that this Court accept certiorari. This case also demonstrates the need to establish minimum standards of procedural due process owed to condemnees, and this Court should also grant the petition to resolve this important

question. For all of the foregoing reasons, amicus respectfully asks this honorable Court to grant the petition.

Respectfully submitted,

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173 (4)

No. 10-402

Supreme Court, U.S.
FILED
OCT 22 2010
OFFICE OF THE CLERK

In the
Supreme Court of the United States

TUCK-IT-AWAY, INC., et al.,

Petitioners,

v.

NEW YORK STATE URBAN DEVELOPMENT CORPORATION, d/b/a EMPIRE STATE DEVELOPMENT CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of New York

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under what circumstances does the higher scrutiny described in Justice Kennedy's concurring opinion in *Kelo v. City of New London*, 545 U.S. 469 (2005), apply, and what does such scrutiny encompass?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

SUMMARY OF REASONS FOR GRANTING THE PETITION 2

REASONS FOR GRANTING THE PETITION 3

I. THE *KELO* MAJORITY AND JUSTICE KENNEDY'S CONCURRING OPINION MANDATE THAT PRETEXTUAL CLAIMS RECEIVE SERIOUS CONSIDERATION AND, DEPENDING ON THE CIRCUMSTANCES, WARRANT HEIGHTENED SCRUTINY 3

II. MANY LOWER COURTS HAVE FAILED TO FOLLOW *KELO*'S AUTHORIZATION OF HEIGHTENED SCRUTINY FOR PRETEXTUAL CLAIMS AND INSTEAD HAVE REFLEXIVELY APPLIED RATIONAL BASIS REVIEW 6

A. The New York Court of Appeals Below Entirely Ignored *Kelo*'s Multi-Level Scrutiny 6

B. The Second Circuit Effectively Ignored *Kelo*'s Multi-Level Scrutiny 8

C. The Third Circuit Effectively Ignored *Kelo*'s Multi-Level Scrutiny 11

TABLE OF CONTENTS—Continued

Page

III. EVEN THOSE COURTS THAT HAVE ALLOWED PRETEXT CLAIMS TO GO FORWARD DO NOT RECOGNIZE A MULTI-LEVEL SCRUTINY, AND REACH THEIR RESULTS BY INCONSISTENT MEANS, FURTHER REINFORCING THE LOWER COURTS' CONFUSION 14

A. The District of Columbia Court of Appeals Allowed a Pretext Claim To Go Forward, but Provided No Guidance on What Scrutiny To Apply . . . 14

B. The Rhode Island Supreme Court Ruled in Favor of a Pretext Claim, but Provided No Guidance on the Scrutiny Applied 16

C. The Hawaii Supreme Court Allowed a Pretext Claim To Go Forward, but Provided No Guidance on What Scrutiny To Apply . . . 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page

Cases

Carole Media, LLC v. N.J. Transit Co.,
550 F.3d 302 (3d Cir. 2008) 11-13

Cascott, L.L.C. v. City of Arlington,
278 S.W.3d. 523 (Tex. Ct. App. 2009) 13

County of Hawai'i v. C&J Coupe Family Limited Partnership, 198 P.3d 615 (Haw. 2008) 18-20

Franco v. District of Columbia,
3 A.3d 300 (D.C. 2010) 15

Franco v. National Capital Revitalization Corp., 930 A.2d 160 (D.C. 2007) 14-16, 18

Goldstein v. Pataki, 516 F.3d 50 (2d Cir.), *cert. denied*, 128 S. Ct. 2964 (2008) . . . 8-9, 11, 20

Hawaii Hous. Auth. v. Midkiff,
467 U.S. 229 (1984) 1, 3, 6-7, 13, 19

Kelo v. City of New London,
545 U.S. 469 (2005) . . . . . *passim*

Nollan v. California Coastal Comm'n,
483 U.S. 825 (1987) 1

Palazzolo v. Rhode Island, 533 U.S. 606 (2001) . . . 1

Rhode Island Econ. Dev. Corp. v. The Parking Company, L.P.,
892 A.2d 87 (R.I. 2006) 16-18

TABLE OF AUTHORITIES—Continued

Page

Rhode Island Econ. Dev. Corp. v. The Parking Company, L.P., 909 A.2d 943 (R.I. 2006) 17

Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725 (1997) 1

Rules

Sup. Ct. R. 37.2(a) 1

Sup. Ct. R. 37.6 1

Miscellaneous

Burling, James, *The Latest Take on Background Principles and the States' Law of Property After* Lucas *and* Palazzolo, 24 Hawaii L. Rev. 497 (2002) 1

Sandefur, Timothy, *Mine and Thine Distinct: What* Kelo *Says About Our Path*, 10 Chap. L. Rev. 1 (2006) 1

Somin, Ilya, *Controlling the Grasping Hand: Economic Development Takings after* Kelo, 15 S. Ct. Econ. Rev. 183 (2007) 3-4

INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) was founded over 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF has participated in numerous cases before this Court and many other state and federal courts both as counsel for parties and as amicus curiae, in cases involving private property and eminent domain.[1]

PLF represented property owners in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and participated as amicus curiae in *Kelo v. City of New London*, 545 U.S. 469 (2005), and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). PLF attorneys also have published scholarly works on the subject of eminent domain and property rights generally. *See* Timothy Sandefur, *Mine and Thine Distinct: What* Kelo *Says About Our Path*, 10 Chap. L. Rev. 1 (2006); James Burling, *The Latest Take on Background Principles and the States' Law of Property After* Lucas *and* Palazzolo, 24 Hawaii L. Rev. 497 (2002). Because of its history and experience with regard to private property and the power of eminent domain, PLF believes that its perspective will aid this Court in considering the petition.

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[1] In accordance with Rule 37.2(a), PLF provided ten days' notice to counsel of record of its intention to file this amicus brief. Counsel of record have consented to the filing of this brief. Letters evidencing this consent have been filed with the Clerk of the Court. In accordance with Rule 37.6, PLF states that no counsel for a party authored any portion of this brief and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief.

SUMMARY OF REASONS FOR GRANTING THE PETITION

In *Kelo v. City of New London*, this Court held that the condemnation of private property for "economic development" does not invariably violate the Public Use Clause of the Fifth Amendment. *See* 545 U.S. 469, 489 (2005). But while the Court approved the City of New London's condemnation of several homes, it nevertheless made clear that the Public Use Clause does limit the eminent domain power to some degree, and that "the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*." *Id.* at 477. The Court elaborated that, in the absence of certain procedural protections for private property owners, an apparent "one-to-one" transfer of property "would certainly raise a suspicion that a private purpose was afoot." *Id.* at 487. Yet the majority opinion did not identify the precise circumstances in which courts should be alert to the risk of impermissible "one-to-one" transfers. *Cf. id.* Justice Kennedy's concurring opinion, however, did offer a framework of degrees of scrutiny to determine whether condemnations, ostensibly for public use, are in fact pretextual private takings. *See id.* at 491-93 (Kennedy, J., concurring).

Unfortunately, many lower courts, including the New York Court of Appeals in this case, have failed to abide by *Kelo*'s direction that a property owner's allegations that a taking is for an impermissible private use should receive substantial consideration. Instead, these courts have used minimal scrutiny when adjudicating pretextual takings claims and have declined seriously to entertain pleas for heightened scrutiny. Even those courts that have been open to

pretext claims have not articulated a consistent and comprehensible scrutiny doctrine. The Court should therefore grant the petition to clarify when such heightened scrutiny should be applied, using Justice Kennedy's *Kelo* concurrence as a starting point.

REASONS FOR GRANTING THE PETITION

I

THE *KELO* MAJORITY AND JUSTICE KENNEDY'S CONCURRING OPINION MANDATE THAT PRETEXTUAL CLAIMS RECEIVE SERIOUS CONSIDERATION AND, DEPENDING ON THE CIRCUMSTANCES, WARRANT HEIGHTENED SCRUTINY

Prior to the Court's decision in *Kelo*, the law of pretextual takings was clear: if a rational basis existed to support the government's condemnation of the property as furthering a public use, then the condemnation was almost always constitutional. *See Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 243 (1984). But in *Kelo* Justice Stevens' majority opinion expressly cautioned that seeming "one-to-one" transfers accomplished without any serious protections for landowners "would certainly raise a suspicion that a private purpose was afoot."[2] 545 U.S. at 487. And in

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[2] *See* Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings after* Kelo, 15 S. Ct. Econ. Rev. 183, 189-90 (2007) ("*Kelo* actually represents a modest improvement on the Court's previous public use decisions, by holding out the possibility

(continued...)

upholding the condemnations in that case, the Court relied on the fact that the condemnations were the result of procedures designed to protect against impermissible private takings.[3] *Id.* at 478 (noting that condemnations were pursuant to a " 'carefully considered' development plan" and that there was no evidence of pretext); *id.* at 483-84 (again noting the City's "carefully formulated . . . economic development plan" resulting from "thorough deliberation"); *id.* at 486-87 (discussing importance of an "integrated development plan"); *id.* at 488 (discussing importance of a "comprehensive redevelopment plan").

Justice Kennedy, who provided the decisive fifth vote for the *Kelo* majority, elaborated in his concurring opinion on the types of circumstances that should raise the "suspicion" that a condemnation purportedly to be for the public's benefit is, in reality, an impermissible private taking. Specifically, Justice Kennedy offered a two-tiered approach. Most pretext claims should be adjudicated according to a "meaningful rational basis review," *id.* at 492 (Kennedy, J., concurring), under

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[2] (...continued)
of slightly greater judicial scrutiny than was available under [prior decisions].").

[3] It is interesting to note, however, that investigative reporting completed after the *Kelo* decision revealed a wealth of evidence indicating that the condemnations were motivated by illegitimate private purposes. *See* Somin, 15 S. Ct. Econ. Rev. at 236-38. *See, e.g., id.* at 237 ("Evidence uncovered by an investigative reporter . . . shows that Pfizer 'ha[d] been intimately involved in the project since its inception' and that the . . . development plan and associated condemnations was 'a condition of Pfizer's move' to New London."). If anything, the true *Kelo* story underscores the importance of allowing for heightened scrutiny of prextextual takings claims.

which the property owner bears the burden of making a "clear showing" that the condemnation is intended to benefit a private party, and that the public benefits of the condemnation are "only incidental or pretextual," *id.* at 491. If the property owner can make such a "plausible accusation" of pretext, then a court must treat the claim as a "serious one," although the court's review of the record will be guided by a presumption in favor of the government. *Id.*

Yet at the same time, Justice Kennedy responded to the dissenters' criticisms that "meaningful rational basis review" would not be adequate to protect landowners against constitutional abuse, by observing that neither the Court's precedents nor the *Kelo* majority opinion categorically forecloses the imposition of heightened scrutiny to pretextual takings claims. *Id.* at 493. Indeed, "[t]here may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that *a presumption (rebuttable or otherwise) of invalidity is warranted* under the Public Use Clause." *Id.* (emphasis added). Justice Kennedy went on to list the various aspects of the *Kelo* condemnation that led him to conclude that heightened scrutiny, and a presumption of invalidity, should not be applied in that case: the City had a "comprehensive development plan"; the identity of the private parties to be benefited by the condemnation was unknown at the time of the plan's drafting; and the condemnation was executed pursuant to "elaborate procedural requirements." *Id.* Justice Kennedy then listed three types of pretextual takings claims where heightened scrutiny, and a presumption of invalidity, should be applied: (1) transfers raising a high suspicion of pretext; (2) transfers resulting from procedures very prone to

abuse; and (3) transfers the benefits of which are "trivial or implausible." *See id.*

Because of various legislative safeguards, the taking in *Kelo* did not fall into any of these categories warranting heightened scrutiny. Yet questions remain. What kinds of claims *would* fall into these categories? What kinds of procedural protections would take a claim outside of heightened scrutiny and subject the claim to "meaningful" rational basis review? These questions have given rise to much confusion in the lower courts in the five years since *Kelo* was decided.

II

MANY LOWER COURTS HAVE FAILED TO FOLLOW *KELO*'S AUTHORIZATION OF HEIGHTENED SCRUTINY FOR PRETEXTUAL CLAIMS AND INSTEAD HAVE REFLEXIVELY APPLIED RATIONAL BASIS REVIEW

A. The New York Court of Appeals Below Entirely Ignored *Kelo*'s Multi-Level Scrutiny

In rejecting Petitioners' pretext claim, the New York Court of Appeals was content to identify two ostensible public purposes for the Columbia redevelopment project that had some measure of support in the record—namely, the remediation of blight and the pursuit of a "civic project" having "educational" and other benefits. Pet. App. at 18a-21a, 26a-27a. The court thus applied the paradigmatic rational basis standard of pre-*Kelo* pretext claims, *i.e.*, upholding the taking because it is "rationally related to a conceivable public purpose."

Midkiff, 467 U.S. at 241. The decision does not explain why it chose not to apply the heightened scrutiny and presumption of invalidity sketched in the second half of Justice Kennedy's concurrence.

That failure is particularly significant, given the evidence in the record strongly indicating that this case falls into one of the three categories that the *Kelo* concurrence identifies as warranting heightened scrutiny. The plurality opinion of the intermediate appellate court below expressly noted the similarities between this case and those cases evincing an "improper motive in transfers to private parties with only discrete secondary benefits to the public," Pet. App. at 53a, a description that fits comfortably within Justice Kennedy's third category. *Cf. Kelo*, 545 U.S. at 493 (Kennedy, J., concurring) (transfers "the purported benefits [of which] are so trivial or implausible" that they warrant heightened scrutiny). The plurality opinion observed that the redevelopment area was not economically depressed when the redevelopment plan was initiated, Pet. App. at 54a-55a; the redevelopment plan was paid for by Columbia University, not a government agency, *id.* at 55a; the government gave no serious consideration to other competing plans, *id.* at 55a-56a; and Columbia already owns or controls many of the allegedly blighted properties, *id.* at 60a. These facts led the plurality to conclude that the "record overwhelmingly establishes that the true beneficiary of the scheme to redevelop . . . is . . . Columbia University," *id.* at 65a.

If a record this strong on pretextual evidence does not trigger heightened scrutiny, it is difficult to imagine what circumstances *would* trigger a more searching review. The *Kelo* majority made clear that

a closer review is warranted in some cases, and Justice Kennedy's concurrence strongly indicates that cases with a record like the one assembled here should warrant such scrutiny. The New York Court of Appeals' failure to cite *Kelo*, or seriously to consider the multi-level scrutiny analysis intimated by the *Kelo* majority and outlined in Justice Kennedy's concurrence, supports the need for this Court's clarification as to when heightened scrutiny is warranted.

B. The Second Circuit Effectively Ignored *Kelo*'s Multi-Level Scrutiny

In *Goldstein v. Pataki*, 516 F.3d 50 (2d Cir.), *cert. denied*, 128 S. Ct. 2964 (2008), a group of landowners challenged the Atlantic Yards Arena and Redevelopment Project, a plan that would result in a new professional football stadium, parks, affordable housing, and the redevelopment of some blighted areas, but would require the transfer of private property to a private developer. *Id.* at 52-53. The landowners argued that a substantial motivation of the project was the government's desire to benefit the project's private developer. *Id.* at 54. The Second Circuit rejected the landowners' pretext claim, using (like the New York Court of Appeals below) a pre-*Kelo* rational basis test containing none of the "meaningful" review urged in Justice Kennedy's concurrence. *See id.* at 58 (employing the "palpably without reasonable foundation" standard in place of heightened scrutiny). The court was satisfied that the redevelopment project was on its face designed to produce public benefits. *Id.* at 58-59 ("[V]iewed objectively, the Project bears at least a rational relationship to several well-established categories of public uses . . . ."). It held that judges

should merely "discern a valid public use to which the project is rationally related," *id.* at 60, a lenient standard of review that conflicts with the "meaningful rational basis review" which, the *Kelo* concurrence states, is the minimum standard for *all* pretext claims, *see Kelo*, 545 U.S. at 491-92 (Kennedy, J., concurring).

Although the Second Circuit's application of a pre-*Kelo* rational basis review is troubling, far worse is the decision's effective elimination of heightened scrutiny and the presumption of invalidity for nearly all pretext claims. The Second Circuit acknowledged the landowners' allegations of pretext to concern "purported excesses in the costs of the plan as measured against its benefits," *Goldstein*, 516 F.3d at 62, allegations which also fall comfortably within one of Justice Kennedy's three categories warranting heightened scrutiny—namely, transfers the benefits of which are "trivial or implausible." *See Kelo*, 545 U.S. at 493 (Kennedy, J., concurring). Nevertheless, the court rejected the pretext claim on the pleadings because (1) the landowners had "already acknowledged the Project's rational relationship to numerous well-established public uses," *Goldstein*, 516 F.3d at 62; (2) heightened scrutiny "would add an unprecedented level of intrusion into the process" and would lead courts into "second-guessing every detail in search of some illicit improper motivation," *id.* at 62-63; and (3) the landowners had failed to allege specific instances of illegality or improper dealings concerning the project, *see id.* at 64.

The Second Circuit's apparent reasons for not acknowledging a multi-level scrutiny approach to pretext claims are unconvincing. First, the Second Circuit thought it significant that the project, on its

face, pursued acknowledged public purposes. But this observation only proves that a person could rationally consider the project to be related to a public purpose, which is the definition of rational basis, not *heightened*, scrutiny. Second, the court's fears of judicial overreach are misplaced. By its very nature, heightened scrutiny implies *some degree* of searching review of the record that otherwise cannot be obtained with rational basis scrutiny. To hold that increased judicial scrutiny is to be avoided at all costs is tantamount to abandoning heightened scrutiny altogether, a result reconcilable with neither the *Kelo* majority, *see* 545 U.S. at 487, nor Justice Kennedy's concurrence, *see id.* at 493 (Kennedy, J., concurring). Third, the court demanded that pretext claimants allege specific examples of pretextual action (without the aid of discovery); but requiring that the *landowner* produce examples of impropriety turns heightened scrutiny on its head. After all, as Justice Kennedy's concurrence reveals, one of the hallmarks of heightened scrutiny is that it places the burden on the *government* to defend its actions, not on the landowner to prove the actions' illegality. *Cf.* 545 U.S. at 491, 493. Moreover, the Second Circuit's categorical assignment of the burden of production to landowners cannot be reconciled with the *Kelo* concurrence's assertion that certain types of private transfers are so fraught with the risk of abuse that the burden should be placed on the government to demonstrate that a transfer really benefits the public generally. *See id.* at 493.

The Second Circuit's discussion of Justice Kennedy's concurrence entirely ignores his analysis of when heightened scrutiny should be applied to pretextual claims of private transfers. In a footnote, the court, citing to that portion of Justice Kennedy's

opinion setting forth his "meaningful rational basis review," opined that the standard was likely intended to apply only to those private transfers the sole ground of which was economic development. *See Goldstein*, 516 F.3d at 64 n.10. The court explained that, because Justice Kennedy relied on Equal Protection Clause precedents to flesh out his rational basis standard, it therefore followed that he did not intend a more searching review. *See id.* But as noted above, neither the *Kelo* majority opinion nor Justice Kennedy's concurrence ends with rational basis. Rather, both opinions anticipate a higher standard of review for certain classes of pretext claims. Justice Kennedy's concurrence in particular provides an outline of when and how heightened scrutiny should apply. The Second Circuit's analysis cannot be reconciled with *Kelo*.

C. The Third Circuit Effectively Ignored *Kelo*'s Multi-Level Scrutiny

In *Carole Media, LLC v. N.J. Transit Co.*, 550 F.3d 302 (3d Cir. 2008), the Third Circuit Court of Appeals rejected a public use challenge to New Jersey's revamping of its billboard licensing rules. Carole Media had obtained three billboard permits with New Jersey Transit. Shortly thereafter a scandal erupted: two high-placed aides to the governor had been discovered using their influence to obtain lucrative billboard permits for others, even where local regulation would have forbidden the billboards. *See id.* at 305. In response, the state legislature enacted a number of anticorruption protections for the billboard licensing system, among them requiring state agencies to employ competitive bid programs for billboard licenses. *Id.* To that end, New Jersey Transit hired All

Vision, LLC, to be its managing agent. *Id.* The agency then embarked upon its licensing reform program, which required that all existing licenses be terminated and then rebid competitively. All Vision, as the facilitator of this process, would receive management fees. When New Jersey Transit demanded that Carole Media surrender its licenses, Carole Media filed suit, claiming that the license rebidding program was a pretextual taking designed to enrich All Vision. *See id.* at 306. Specifically, Carole Media argued that the billboard program "'merely replac[ed] one long-term relationship with an incumbent billboard operator with another long-term relationship with a new incumbent,'" an arrangement that " 'solely . . . benefit[ed] . . . All Vision' through the payment of disproportionate management fees on the large, up-front payments bidders w[ould] be required to make under the Program." *Id.* (citation omitted).

The Third Circuit rejected Carole Media's public use claim, relying expressly on the *Midkiff* "rationally related to a conceivable public purpose" standard. *See id.* at 309. Quoting from Justice Kennedy's concurrence, the Third Circuit ruled that a pretext claim cannot be maintained when the property owner has failed to make "'a plausible accusation of impermissible favoritism.'" *Id.* at 311 (quoting *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring)). The quoted phrase, however, comes from Justice Kennedy's discussion of his "meaningful rational basis" standard, *not* from his discussion of when and how to apply heightened scrutiny and the presumption of invalidity. *Compare Kelo*, 545 U.S. at 491-92 *with id.* at 493.

Again citing Justice Kennedy's concurrence, the Third Circuit held that Carole Media's pretext claim

was barred because there was no allegation that the government "knew the identity of the successful bidder for the long-term licenses at those locations." 550 F.3d at 311 (citing *Kelo*, 545 U.S. at 493) (Kennedy, J., concurring)). The court misconstrued and misapplied the categories of cases that, according to Justice Kennedy, warrant heightened scrutiny. After all, New Jersey Transit *did* know who would benefit from the relicensing program—All Vision—before it demanded that Carole Media surrender its licenses. Such knowledge surely raises a "suspicion" that a private taking is afoot.

The Third Circuit concluded its analysis holding that the mere assertion that a private party "will receive an excessive payment for its role as management agent" cannot support a pretext claim. Such an allegation "simply fails to demonstrate that [the government's] alleged taking was not 'rationally related to a conceivable public purpose.'"[4] *Id.* at 311-12 (quoting *Midkiff*, 467 U.S. at 241). But the degree to which a private party is "overpaid" as a result of a private taking *is* relevant to whether the taking is "so suspicious" as to warrant heightened scrutiny. *See Kelo*, 545 U.S. at 493 (Kennedy, J., concurring). The

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[4] The Texas Court of Appeals reached a similar conclusion in *Cascott, L.L.C. v. City of Arlington*, 278 S.W.3d. 523 (Tex. Ct. App. 2009), in rejecting the plaintiff property owners' challenge to the City of Arlington's condemnation of their land to facilitate a 30-year lease with the Dallas Cowboys. The court, citing *Goldstein*, reasoned that, because "the Lease furthers and promotes the public purpose of the venue project for which the condemnation proceedings were instituted," it does not matter that "the Dallas Cowboys stand to reap substantial benefits from the project, including the Lease." *Id.* at 529. The court did not cite or discuss Justice Kennedy's three categories of pretext cases for which heightened scrutiny is warranted.

Third Circuit's holding that such a consideration does not survive rational basis scrutiny entirely ignores whether that consideration is relevant to heightened scrutiny. The Third Circuit's analysis cannot be squared with *Kelo*.

III

EVEN THOSE COURTS THAT HAVE ALLOWED PRETEXT CLAIMS TO GO FORWARD DO NOT RECOGNIZE A MULTI-LEVEL SCRUTINY, AND REACH THEIR RESULTS BY INCONSISTENT MEANS, FURTHER REINFORCING THE LOWER COURTS' CONFUSION

Several appellate decisions after *Kelo* have allowed pretext claims to go forward, but these decisions have not recognized a multi-level scrutiny analysis. Instead, they have merely concluded that the particular record assembled before them supported a finding of pretext, without identifying the standard of scrutiny being applied, or whether more than one level of scrutiny may be warranted.

A. The District of Columbia Court of Appeals Allowed a Pretext Claim To Go Forward, but Provided No Guidance on What Scrutiny To Apply

In *Franco v. National Capital Revitalization Corp.*, 930 A.2d 160 (D.C. 2007), the District of Columbia Court of Appeals reversed a trial court's dismissal of a landowner's pretext claim, specifically rejecting the lower court's conclusion that "an owner is foreclosed as a matter of law from demonstrating that

the stated reason [for the condemnation] is a pretext."[5] *Id.* at 168. The court of appeals cited the *Kelo* majority opinion for the proposition that "a property owner must in some circumstances be allowed to allege and to demonstrate that the stated public purpose for the condemnation is pretextual," while acknowledging that "[i]t may be difficult to make this showing." *Id.* at 169.

The court discussed Justice Kennedy's concurrence in a footnote, concluding that, although the concurrence's analysis was not part of *Kelo*'s holding, it "may accurately predict what the Court will hold when the record before it does not resolve the pretext issue." *Franco*, 930 A.2d at 169 n.8. The court's analysis focused solely on whether the landowner had alleged facts that, if true, would establish an impermissible pretext. *See id.* at 170-71.

Noting the lack of guidance from this Court on what constitutes pretext, *see id.* at 172, *Franco* nevertheless concluded that, where the public benefits of a private taking are "incidental" or "pretextual," a pretext claim "may well succeed," but where the private taking serves an "overriding public purpose" providing "substantial" public benefits, a pretext claim must fail. *See id.* at 173-74. The court further explained that the particular facts of *Kelo*—the existence of a development plan and other procedural safeguards—are not "constitutional standards"

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[5] On remand, the trial court granted summary judgment to the government on the grounds that the property owner's pretext claim was barred by collateral estoppel. The Court of Appeals reversed and remanded, holding that collateral estoppel did not apply and declining to address the government's alternative basis for affirmance. *See Franco v. District of Columbia*, 3 A.3d 300 (D.C. 2010).

according to which a pretext claim stands or falls based on the absence or presence of those facts in other cases. *See id.* at 175.

Franco's pretext analysis is unhelpful because it does not reveal whether the court applied rational basis or heightened scrutiny. The court was concerned about (1) whether the public benefits of a private taking are "incidental," (2) whether the public benefits of a private taking are "substantial," and (3) whether the taking's public purpose is "overriding." *See id.* at 173-74. Yet all these considerations are relevant to *both* scrutiny standards. The main difference between the two standards is in the degree of deference given the government when the court reviews the record. As Justice Kennedy's concurrence notes, with "meaningful rational basis review" the presumption lies with the government, while the reverse is true with heightened scrutiny. *See Kelo*, 545 U.S. at 491. But to declare, as *Franco* does, that the legislature enjoys deference when the private taking serves an overriding public purpose is merely to state a legal conclusion, not to provide a reason for that conclusion. *Franco* fails to clarify the post-*Kelo* confusion.

B. The Rhode Island Supreme Court Ruled in Favor of a Pretext Claim, but Provided No Guidance on the Scrutiny Applied

A similar lack of clarity occurs in the Rhode Island Supreme Court's decision in *Rhode Island Economic Development Corp. v. The Parking Company, L.P.*, 892 A.2d 87 (R.I. 2006). There, the government attempted to condemn the lease of the defendant parking company to operate an airport parking facility. The company objected to the condemnation as a pretextual

private taking. The court agreed but its agreement was based only on the record developed for that case, and without any specific discussion of the standard of review to be employed, or the burden of production necessary, for pretext claims.[6]

The government had argued that the primary purpose of the taking was to increase airport parking. *Id.* at 105. The court rejected the assertion, finding that the record revealed that the government's "motivation . . . was to increase revenue and not create additional airport parking." *Id.* at 106. But nowhere does the decision state what standard of scrutiny should be applied, or when the burden should be on the government to establish the taking's nonpretextual motivation. Instead, its discussion of legislative deference further confuses the issue.

For example, the court's opinion ostensibly adopts the *Midkiff* standard, *see id.* at 103, and notes that the court "accord[s] deference to the findings of the condemning authority," *id.* at 104. These standards are consistent with rational basis scrutiny. But the decision then states that the determination of a public use "must be decided on a case by case basis," *id.*, and faults the condemning authority for "fail[ing] to make any findings that the taking would serve the public," *id.* at 105. These criticisms presuppose that something more than a *Midkiff* rational basis scrutiny is being applied. Adding to the confusion is the importance the

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[6] On remand, the trial court declined to award the parking company damages for the period of the government's wrongful possession. The state supreme court, on appeal, again reversed the trial court, holding that the parking company was so entitled. *See Rhode Island Econ. Dev. Corp. v. The Parking Company, L.P.*, 909 A.2d 943 (R.I. 2006).

decision places on the factual differences between the procedures governing the Rhode Island Economic Development Corporation's condemnation and the City of New London's condemnation in *Kelo*, *see id.* at 104, 106, differences that *Franco* considered *irrelevant*, *see* 930 A.2d at 175. *The Parking Company*, like *Franco*, fails to clarify the post-*Kelo* confusion.

C. The Hawaii Supreme Court Allowed a Pretext Claim To Go Forward, but Provided No Guidance on What Scrutiny To Apply

Perhaps most confusing among the lower court cases decided since *Kelo* that have ruled in favor of pretext claims is *County of Hawai'i v. C&J Coupe Family Limited Partnership*, 198 P.3d 615 (Haw. 2008). There, the landowner challenged the condemnation of its land to allow for a public road to be built, contending that the road, although public, was being constructed to satisfy the needs of a private development. The trial court dismissed the claim on its face, concluding that the articulation of a "classic" public purpose (like road construction) made the condemnation absolutely immune from a pretext challenge. The Hawaii Supreme Court reversed and remanded, holding, as in *Franco*, that the landowner could advance a pretext claim. *See id.* at 652-53. In reaching that conclusion, the court expressly rejected an invitation to adopt Justice Kennedy's "meaningful rational basis" scrutiny, concluding that "the majority opinion in *Kelo*, as well as our own cases, provide ample authority to require the [lower] court to reach the issue of pretext." *Id.* at 642. Such a refusal would imply that the court could adjudicate the matter in favor of the property owner using a *less rigorous*

standard of review. Yet the court's subsequent analysis is not wholly consistent with that standard of review.

For example, the court explained that, under the *Kelo* majority opinion, "although the government's stated public purpose is subject to prima facie acceptance, it need not be taken at face value where there is evidence that the stated purpose might be pretextual." *Id.* at 644. That statement implies a high standard of scrutiny, rather than rational basis. Yet, the court then observed that a presumption in favor of the government could be overturned by clear and palpable evidence of a taking, *id.* at 644 n.33, which recalls the rational basis standard of *Midkiff*. But the court next rejected the contention that a pretext claim challenging a "classic" public use, such as road building, must necessarily fail, *see id.* at 647-48, even though such a "classic" use limitation is fully consistent with the *Midkiff* "rationally related to a conceivable public purpose" standard. *See* 467 U.S. at 241. Thus, the court appeared in just a few paragraphs both to approve and to dispense with the same scrutiny standard.

The court then, quoting the *Kelo* majority, noted that "even where the government's stated purpose is a 'classic' one, where the actual purpose is to 'confer[] a private benefit on a particular private party[,]' the condemnation is forbidden," *County of Hawai'i*, 198 P.3d at 648 (quoting *Kelo*, 545 U.S. at 477). Nevertheless, the court disclaimed "call[ing] for a 'close[] scrutiny [of] the motives of the City Council' or the 'subjective motivation of every official,'" *County of Hawai'i*, 198 P.3d at 649 n.37. A property owner would presumably be required to establish these factors in

order to prove a pretext in the face of a "classic" public use. The court distinguished *Goldstein* on precisely this ground: there the landowners invited an investigation of subjective motivations, whereas here no such inquiry would be required. *See id.* at 649. Yet the court went on to hold that a pretext claimant's allegation of a "predominantly private benefit" could invalidate a condemnation notwithstanding "the stated public purpose." *See id.* That *was* the argument the *Goldstein* property owners made. *See Goldstein*, 516 F.3d at 59 ("[P]laintiffs . . . expend considerable effort explaining why these proffered public uses should nonetheless be rejected as 'pretextual,' not because they are false, but because they are not the real reason for the Project's approval.").

Thus, the court ruled in favor of a pretext claimant while disclaiming reliance on Justice Kennedy's *Kelo* concurrence, and yet applying a standard of review that at times appears to reject the traditional rational basis review antedating *Kelo*. Like *Franco* and *The Parking Company*, *C&J Coupe Family Trust* augments rather than dispels the post-*Kelo* confusion.

CONCLUSION

Confusion reigns among the lower courts over when and how to apply heightened scrutiny to claims of pretextual private takings. Although property owners' pretext claims have fared well in some courts, it is far from clear whether these outcomes were the result of the scrutiny the courts applied, or the strength of the allegations made and the record collected, or some combination of all these factors. In other courts, pretext claims have been tossed out with little thought to whether heightened scrutiny might be

merited. Neither the courts ruling against pretext claims, nor the courts ruling in favor of such claims, have any consistent, thorough, and rigorous doctrine governing their adjudication and the scrutiny to be applied. Review is merited to dispel the confusion and provide guidance. The writ should be granted.

DATED: October, 2010.

Respectfully submitted,

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